IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

No. 555

COLUMBIA BROADCASTING SYSTEM, INC.,
Appellant,

v.

THE UNITED STATES OF AMERICA, FEDERAL COMMUNICATIONS COMMISSION and MUTUAL BROADCASTING SYSTEM, INC.,
Respondents.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF APPELLANT

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January 19, 1943.

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BRIEF OF APPELLANT

This is an appeal by the plaintiff, Columbia Broadcasting System, Inc., from a final decree of the District Court of the United States for the Southern District of New York, dismissing the complaint in this suit.

The suit is one to set aside, annul and permanently enjoin the enforcement of orders of the Federal Communications Commission promulgating regulations applicable to radio stations engaged in chain or network broadcasting. It was instituted against the United States under Section 402(a) of the Communications Act of 1934. The Federal Communications Commission and Mutual Broadcasting System, Inc. intervened as defendants.

Appellant moved for a preliminary injunction and the United States and the Federal Communications Commission moved to dismiss the complaint or for summary judgment. A statutory three-judge court was convened under the Urgent Deficiencies Act made applicable by Section 402(a) of the Communications Act of 1934. On February 21, 1942 that court entered a decree dismissing the complaint for want of jurisdiction over the subject-matter of the suit. This Court reversed (316 U. S. 407), and remanded the suit to the Statutory Court. That court, after hearing further argument on the above motions of appellant and the United States and the Commission, respectively, dismissed the complaint on the grounds that the orders were within the statutory authority of the Commission; that the Act, construed to confer such authority, was constitutional; that the regulations promulgated by the orders were not arbitrary or capricious; and that the complaint, considered in the light of the proceedings before the Commission, presented no issue of fact necessitating a trial.

Opinions Below

The majority and dissenting opinions in the Statutory Court upon the former decree dismissing the complaint for lack of jurisdiction, which was reversed by this Court, are reported in 44 Fed. Supp. 688. The opinion of the Statutory Court (R. 483-493) upon the decree now appealed from is not yet reported.

Jurisdiction

The jurisdiction of this Court is invoked under the provisions for direct appeal in the Urgent Deficiencies Act of October 22, 1913 (38 Stat. 219, 220; 28 U. S. C., Secs.

47-47a), made applicable by Section 402(a) of the Communications Act of 1934 (48 Stat. 1064, 1093; 47 U. S. C., Sec. 402(a)). The decree appealed from (R. 494) was entered November 16, 1942 and the appeal was allowed (R. 496-497) on November 27, 1942.

This Court noted probable jurisdiction on December 14, 1942.

Questions Presented

1. Whether the regulatory power conferred upon the Federal Communications Commission by the Communications Act of 1934 extends to control of the kind of contractual terms which a network organization may make with its affiliated stations as consideration for its furnishing them with a dependable supply of network programs.

2. Whether the Commission is authorized by that Act to promulgate regulations providing for the denial of renewal of licenses to all stations affiliated with network organizations which have in their affiliation contracts provisions deemed by the Commission to be restrictive of competition.

3. Whether the Commission is authorized by that Act to promulgate a regulation providing for the denial to a network organization of renewal of licenses for stations owned by it in all localities where, in the opinion of the Commission, existing stations are so few or of such unequal desirability that competition would be substantially restrained by such licensing.

4. Whether, even if the subject-matter of the regulations was generally within the authority of the Commission under the Act, the order promulgating them must never-

theless be set aside because predicated upon an erroneous interpretation by the Commission of the extent of its power and duty with respect to the promotion of competition in the broadcasting field.

5. Whether, if the Act be construed to authorize the Commission to promulgate the regulations, it is unconstitutional as: (a) an invalid delegation of legislative power under Article I, Section 1, of the Constitution of the United States; or (b) an abridgement of freedom of speech or of the press in violation of the First Amendment thereto.

6. Whether the order must be set aside because the regulations which it promulgates are arbitrary and capricious.

7. Whether the complaint contains allegations of fact upon which appellant is entitled to an answer and, if controverted thereby, to a trial.

Statute Involved

The statute involved is the Communications Act of 1934 (48 Stat. 1064; 47 U. S. C., Secs. 151-609). The sections thereof most directly involved (Sections 301, 303, 304, 307, 308, 309, 311 and 313) are printed in full in the Appendix.

Statement of Facts

The Nature of Network Broadcasting.

Appellant (hereafter referred to as "Columbia") is, and for many years has been, engaged in the business of operating a nation-wide network radio broadcasting system. Such nation-wide broadcasting is accomplished by the broadcasting of programs by the network organization simultaneously over groups of radio broadcasting stations

whose transmitters are linked together by telephone lines of appropriate quality (Complaint, Pars. Third and Fourth, R. 2, 3).

This business is based principally upon contracts, called "affiliation contracts", between Columbia and the various broadcasting stations, located in cities throughout the country, which comprise its network. Columbia supplies network programs to 123 stations, so distributed that the programs can be heard by over ninety percent of the listening audience of the nation. Only eight of these stations are operated by Columbia itself. These are WABC in New York, and stations in Washington, D. C., Chicago, St. Louis, Minneapolis, Los Angeles, Charlotte, N. C. and Boston. The remaining 115 stations are all independently owned and operated, and Columbia's relationship with them depends solely upon the terms of the affiliation contracts, a typical form of which is set forth in Exhibit A annexed to the complaint (R. 12-16). All 123 stations can operate only by virtue of licenses issued by the Federal Communications Commission (Complaint, Pars. Third and Fourth, R. 2, 3; affidavit of William S. Paley, President of Columbia, R. 220). The network organization as such is not licensed.

The American system of furnishing broadcasting service without cost to the listening public is based upon the sale of broadcasting time for advertising purposes. Virtually all the revenue of the industry, both of network organizations and broadcasting stations, is derived from such sales to advertisers. As of the end of 1940 there were about 850 commercial broadcasting stations in the United States (Paley affid., R. 221). Of these about 495 were, in 1940, affiliated with or operated by national net-

works (Commission's Report, p. 30; R. 86), but their business also includes broadcasting of local or other non-network programs. The programs broadcast, whether network or non-network, are either "commercial" ("sponsored") programs, which are those sponsored by advertisers who pay for their broadcasting, or "sustaining" programs, which are not paid for by any advertiser but, when of network origin, are furnished by the network (Complaint, Par. Fourth, R. 3). In the case of network commercial programs, the advertiser pays the network, and the network, in turn, pays the station for the use of its time upon the basis provided in the affiliation contract.

The production of sustaining programs at once serves the public interest and benefits the network and its affiliated stations by building both the good-will and the circulation (audience) which they can offer to advertisers. While many sustaining programs lie solely in the field of entertainment, they include also many of the most distinguished cultural programs, such as, in the case of Columbia, the broadcasts of the New York Philharmonic-Symphony Orchestra, the Cincinnati Conservatory of Music, and other programs of classical music, the Church of the Air, the School of the Air, broadcasts of special events of public importance, etc. (Affidavit of Frank Stanton and Exhibit A thereto, R. 313, 320A-320B), and many of the most important programs of news and news analysis (*id.*, R. 313). Columbia's sustaining programs cost it about five million dollars in 1940 (Paley affid., R. 226). Since the broadcasting industry, substantially speaking, has no revenue except that derived from the sale of station time to advertisers, the commercial programs must carry the sustaining ones financially.

The network system makes possible the production of a quality and variety of programs, both commercial and sustaining, which would otherwise not be available. The supply of performing talent outside of such metropolitan centers as New York, Chicago and Los Angeles is insufficient. Individual stations and local advertisers are financially unable, at their own expense, to plan, develop and offer to their listening audiences the expensive programs which can be economically justified only if the programs enjoy wide-spread simultaneous broadcasting (Paley affid., R. 223).

The broadcasting industry is in constant and intense competition with other advertising media, such as national magazines and newspapers, for the advertiser's dollar. Each national network organization is likewise in competition with other national networks, and the broadcasting stations with the other stations in their respective localities.

The Affiliation Contract.

Columbia's affiliation contracts create a cooperative joint enterprise, comprising Columbia and its affiliated stations, designed to compete as a unit both with other networks and stations and with other advertising media.

By Paragraph 1 of the contract (Ex. A to Complaint, R. 13) Columbia agrees to furnish to the Station all available network sustaining programs without charge, and network sponsored (commercial) programs for which clients may request broadcasting by the Station and which are consistent with Columbia's sales and program policies, and agrees to make available to the Station an average of at least sixty hours per week of network sustaining and sponsored programs. Paragraph 3 (*id.*, R. 14), and the schedule

therein referred to, provide the rates at which Columbia pays the Station for broadcasting network sponsored programs.

By Paragraph 2 (*id.*, R. 13-14) the Station agrees to broadcast all network sponsored programs furnished to it, subject to certain conditions, one being that, except in connection with occasional special events, the Station need not broadcast network sponsored programs totaling more than 50 "converted hours" (this being on the average equivalent to 79 clock hours, Complaint, Par. Fifth, R. 4) per week, and another being that the Station may require Columbia to give not less than 28 days' prior notice of the commencement of sponsored programs for new accounts. This provision is frequently called the "option time" clause, because the effect of the provision may colloquially be said to be to give Columbia an exclusive option, exercisable on 28 days' notice, on 50 converted hours per week of the Station's time. But the phrase "option time" is not found in the Columbia contracts and the analogy to options for the purchase of property is imperfect. The so-called "option time" clause is one of the agreed considerations for Columbia's furnishing its network program service, to the extent of an average of at least sixty hours per week of sustaining and commercial programs. The essence of the station's agreement is that, if Columbia is able to secure a contract from an advertiser which includes that station, the station will broadcast it at such time as the advertising contract may fix (even if it may have to displace a non-network program to do so), provided it is given twenty-eight days' notice and has no reasonable objection to the program.

By Paragraph 8 (Ex. A to Complaint, R. 16) Columbia agrees to make the Station the exclusive Columbia out-

let in the city in which it is located and not to furnish its exclusive network programs to any other station in that city, except in case of public emergency; and the Station agrees to operate as the exclusive Columbia outlet in that city and to so publicize itself, and not to join for broadcasting purposes any other formally organized or regularly constituted group of broadcasting stations, except to broadcast special events of public importance.

Paragraph 15 (*id.*, R. 16) provides the term of the contract which (Complaint, Par. Fifth, R. 4) is usually five years. While the form of contract appended to the complaint includes in this paragraph a provision that the contract may be terminated at any time by Columbia on twelve months' notice (Ex. A to Complaint, R. 16), this termination provision is omitted in the contracts with 44 of the 106 stations whose contracts provide for a term in excess of two years (Affidavit of Herbert V. Akerberg, R. 302). It also appears that in 26 of these 44 cases a term of at least five years was agreed upon at the specific request of the stations, in several instances because they had the opportunity to increase their power or improve thei. plants, or both, and were unwilling to make the large capital expenditure involved without assurance that they would receive Columbia's programs for that period of years (Akerberg affid., R. 303).

The Commission's Regulations.

The Commission's order and amending order complained of promulgated eight regulations (Exs. B and C to Complaint, R. 17-19, 31-33) numbered 3.101 to 3.108, inclusive. Regulations 3.107 and 3.108 are not applicable to Columbia. Of the remaining six, Regulations 3.101 to

3.105 affect Columbia's affiliation contracts, and Regulation 3.106 affects Columbia's right to continue operation of one or more of its own stations.

Regulations 3.101 to 3.105, while ostensibly directed at the conduct of the affiliated stations, are actually directed primarily at network operations as carried on through the affiliation contracts. The important ones of them outlaw the very provisions which are most significant and essential to the relationship between Columbia and its affiliates. They do this by providing that "No license shall be granted to a standard broadcast station" having any contract with a network organization which contains the proscribed provisions. No broadcasting station can operate at all except by virtue of a license from the Commission. Hence, to remain on the air, the affiliated stations must get rid of their contracts with Columbia, or the forbidden provisions thereof, at the latest before their existing licenses expire and they apply for renewal thereof (Complaint, Pars. Fourth, Fifth, Sixth, Seventh and Ninth, R. 3-7, 9-10).

Regulation 3.101 (Ex. B to Complaint, R. 17) provides that no license shall be granted to a station having any contract with a network organization which prevents the station from broadcasting programs of any other network organization; and Regulation 3.102, as amended (Ex. C to Complaint, R. 32), provides, among other things, that no license shall be granted to a station having any contract with a network organization which prevents another station serving substantially the same area from broadcasting the network's programs not taken by the affiliated station, with a proviso that this regulation shall not be construed to prohibit a contract whereby the affiliated station is granted the first call in its primary service area upon the

programs of the network organization. These two regulations would prohibit the substance of Paragraph 8 of the contract containing the reciprocal covenants making the station the exclusive Columbia outlet in the city in which it is located and Columbia the exclusive supplier of network programs for that station.

Regulation 3.103, as amended (Ex. C to Complaint, R. 32), provides that no license shall be granted to a station having any contract with a network organization providing for affiliation for a period longer than two years.

Regulation 3.104, as amended (Ex. C to Complaint, R. 33-34), contains such drastic prohibitions with respect to the "option time" provisions of Paragraph 2 of the affiliation contract as to make them practically valueless to Columbia. It provides, among other things, that no license shall be granted to a station which options for network programs any time subject to call on less than 56 days' notice (instead of the 28 days now provided), or more time than a total of three hours within each of four defined segments of the broadcast day (instead of the maximum of 50 converted hours per week now provided). But, more importantly, it provides that even such options may not be exclusive as against other network organizations, and may not prevent the station from optioning or selling any or all of the time covered by the option, or other time, to other network organizations. The effect of this is to outlaw any reservation of the time of affiliated stations which would be good as against competing networks.

The effect of Regulations 3.101, 3.102 and 3.104 together would be to destroy the network as a joint enterprise, of which the network organization and all its affiliated stations are cooperating members, and to compel a condition

whereby, regardless of affiliation relations, every network is available to every station, and every station to every network, on a "first come, first served" basis. The proviso to 3.102 permits an arrangement whereby an affiliated station might be granted first call upon programs of its network; but 3.104 prohibits any arrangement whereby the network may be given first call upon the time of its affiliated stations. This strikes at the root of the existing affiliation system. Indeed, with the provisions for exclusive relationship and option time excised, there would not be much left which could be appropriately termed an "affiliation" contract.

The remaining regulation affecting the affiliation contract, Regulation 3.105 (Ex. B to Complaint, R. 18), provides, among other things, that no license shall be granted to a station having any contract with a network organization which prevents the station from rejecting, for the reasons described therein, programs offered by its network. Since the applicable provisions in Columbia's affiliation contract (Par. 2, R. 13) substantially correspond to the requirements stated, this regulation would, of itself, make no substantial change in the existing practice, unless the Commission construes it to permit stations to reject network sponsored programs simply because they prefer another program. If it were so construed, however, its effect would be further to weaken the affiliation relation.

Regulation 3.106 (Ex. B to Complaint, R. 18-19) is directed, not at the affiliation contract, but at operation of stations by network organizations. It provides, in so far as it applies to Columbia, that no license shall be granted to a network organization for a station in any locality where the existing stations are so few or of such unequal desirability (in terms of coverage, power, frequency or other re-

lated matters) that competition would be substantially restrained by such licensing. This regulation, as construed by the Commission in its Report (p. 68, R. 124), would require Columbia to dispose of the station owned by it at Charlotte, N. C., and would raise serious doubts whether Columbia would be allowed to continue its ownership of its stations at Minneapolis and Washington, D. C. (Complaint, Par. Seventh, as amended, R. 48).

That the regulations relating to the affiliation contracts were intended not only to prohibit the making of future contracts which might contain the proscribed provisions, but to affect existing contracts which include such terms, is explicitly recognized by the last provision of the original order of May 2, 1941 (Ex. B to Complaint, R. 19)*:

> "IT IS FURTHER ORDERED, That these regulations shall become effective immediately: *Provided,* That, with respect to *existing** contracts, arrangements, or understandings or network organization station licenses, the effective date shall be deferred for 90 days from the date of this Order: *Provided further,* That the effective date of Regulation 3.106 may be extended from time to time with respect to any station in order to permit the orderly disposition of properties."

The pertinent language of the amending order of October 11, 1941 (Ex. C to Complaint, R. 33) is identical.

The Effects of the Regulations.

The allegations of the complaint that the contractual provisions in question are essential to the operation of plaintiff's network business (Par. Sixth, R. 4), and that the effect of the regulations would seriously impair plaintiff's

*All italics in quotations in this brief are supplied.

ability to maintain the integrity of its network operations, with consequent injury both to itself and to the public interest (Par. Tenth, R. 10), are supported with circumstantial detail by the affidavits.

The fundamental fact is that all of Columbia's network activities depend upon its ability to sell broadcasting time to advertisers. Many of Columbia's most important activities are not directly revenue-producing. Their economic justification is the long-range interest, far different from a day-to-day economic stake in particular pieces of business, of building up a reputation for its network whereby it can maintain a circulation which it can sell for its own benefit and that of its affiliated stations. Since that reputation depends upon the favor of the listening public, it follows that Columbia's unremunerative operations can attain the desired end only if they serve the interest of that public.

Thus, many of Columbia's most distinguished musical and other cultural programs, and many of its most important programs of news and news analysis, are sustaining programs (*supra*, p. 6). Reliable studies show that, especially in rural communities and smaller cities and towns throughout the nation, radio broadcasts are more largely relied upon by the people as a source of news even than the newspapers (Stanton affid., R. 314-320). Such pioneering undertakings as the operation of a Latin-American network, and the development of television, to which Columbia has been devoting hundreds of thousands of dollars a year, are also presently unremunerative (Paley affid., R. 243).

Moreover, if Columbia is to maintain its reputation for high standards of program quality and taste, it must refuse many commercial programs which are offered it; and it has in fact refused many million dollars of network business tendered to it in the last few years (Affidavit of

Edward Klauber, R. 321; Paley affid., R. 226). Some of the standards which Columbia had adopted, and which have led to such refusals of business are: Strict standards of suitability for commercial programs and of the products which they advertise, including the absolute prohibition of advertising of laxatives, deodorants and depilatories and graphic or repellant descriptions of bodily functions (Paley affid., R. 226, and Ex. B thereto, R. 249-255); refusal to *sell* time for discussion of controversial public issues (except to political parties during campaigns) and the allotment, instead, of time impartially to spokesmen of opposing views on a non-commercial basis through sustaining programs (Klauber affid., R. 321-323); objective standards for broadcasts of news analysis (*id.*, R. 323-325), especially in war reporting (Exs. A and B to Klauber affid., R. 327-337); and insistence that religious broadcasts shall be widely representative of all faiths and shall never be commercial programs (Klauber affid., R. 325-326).

It is apparent that Columbia is essentially a publication, addressing the ear rather than the eye, the nation-wide audience reached through its owned and affiliated stations corresponding to the circulation of a national magazine or the newspapers; and that its reputation and program enterprise are as important to its business integrity and goodwill as are the reputation and contents of any printed periodical.

Anything which impairs Columbia's ability to sell to advertisers the time of its affiliated stations strikes at the foundation of its business and threatens disintegration of all of its operations. Distinguished sustaining programs cannot be maintained unless there is a sufficient volume of commercial programs to carry them, and losses of revenue through refusing unsuitable commercial programs must be made up by getting other suitable ones.

One effect of the regulations, especially 3.104, is obvious. If Columbia cannot assure a national advertiser that it can deliver the stations which the advertiser wants, the network broadcasting method of advertising becomes much less attractive in comparison with other media.

Mr. Paley's affidavit shows (R. 239-240) that national advertising efforts must be carefully and scientifically planned; that it sometimes requires months of market study and research, program planning and negotiations, before an advertiser decides whether to use network broadcasting at all or, if so, what stations and programs to utilize; that it is accordingly practically impossible to persuade an advertiser to use a network, involving the working out of a program idea, and the expense of outstanding program talent and the like, if the network is not able to know and inform the advertiser in advance what stations and what time the network has to offer, in short what circulation he would get for the money he would spend; that under the Commission's regulation with respect to option time, the network might spend months of effort in convincing the sponsor, in helping him select the territory in which to broadcast his program, the stations to utilize, the character of the program and the talent, and then find itself unable to provide either the stations or the time desired by the advertiser in the markets which he desires to cover.

Radio's chief competitors for the advertiser's dollar, such as the newspapers, and magazines having national distribution, are able to assure advertisers of a definite circulation, and radio networks will be unable to meet their competition unless they are able to give advertisers corresponding assurance with respect to the circulation they can deliver (Paley affid., R. 227, 240). Under Regulations 3.101 and 3.104 it would be not only possible but probable

that during the course of such a negotiation between Columbia and a national advertiser for, say, the hour between eight and nine on Monday evenings, one after another of the stations supposed to be on Columbia's network would disappear because that hour—or, what would be just as bad, some quarter or half hour within it—had been preempted by other networks. If a station so much as agreed to hold the time open for one week, while an advertiser made up his mind or concluded his talent contracts, it would violate the Commission's regulation and lose its license. Obviously, the loss of even a few such stations, if they were strategically located to serve major markets which the advertiser desired to cover, would be enough to make the network no longer satisfactory to him. The resulting loss of such an advertising contract would harm not only Columbia, but every station on its network which would otherwise have participated in it.

Other disintegrating effects of the regulations are less obvious, but they are just as real. Columbia must be assured of the opportunity to sell the time of its affiliated stations in order to make up revenues sacrificed through withholding time from sale to accommodate distinguished sustaining programs, and through refusing unsuitable commercial programs. Under its existing relations with its stations Columbia knows that it can recoup itself by doing a sufficient overall business to assure its economic ability to do these things, provided only that the business is available and Columbia competitively able to get its share.

At present, when Columbia withdraws time from sale and devotes it to sustaining programs of a nature deemed not appropriate for sponsorship or of a kind which no advertiser is willing to sponsor even though they be of great service to the listening public, Columbia knows that

its affiliates cannot sell that time to another network. Columbia is therefore not making a vain sacrifice of revenue. But under the regulations, the stations might reject the sustaining program and sell the time to another network for a commercial program. Thus, Columbia would have robbed itself of an opportunity to make a sale of time without the compensating benefit of providing the listening public with an outstanding cultural or educational feature.

At present when Columbia rejects as unsuitable a commercial program offered for a certain time, it has a fair opportunity to get an acceptable program from another advertiser for that period. Even if another network should accept the program which Columbia rejected, Columbia's affiliated stations are not used thereon. But under the regulations the other network could sell the program which Columbia rejected to any of Columbia's stations which would accept it. And, if a few of Columbia's stations in important markets did accept it, Columbia would be unable to sell that period of time to another advertiser proposing a suitable program.

Again, there are many sustaining programs which, because of their nature, can be presented at one time as well as another. Under present practices it is possible to change the hour of such sustaining programs to enable Columbia to sell it to an advertiser who desires that particular time. But under the regulations many of Columbia's stations might have already sold to other networks the time for which the sustaining program had been scheduled. Thus, when Columbia sought to move the sustaining program to make way for the commercial one, it would be too late because important markets would have gone and the time would be useless to the advertiser.

Finally, apart from impairment of Columbia's economic ability to continue to render its costly sustaining service and to maintain its high commercial standards, it would be highly inequitable to make the circulation and goodwill which Columbia has built up for its affiliated stations salable by competing network organizations which had contributed nothing to such circulation and goodwill.

We feel that it is unnecessary in the ensuing argument to present further the point that the enforcement of the regulations would seriously and irreparably injure Columbia's business. That has been found, presumably on the facts above presented, by the court below in its action granting a stay (R. 494-495). Not only would the directly revenue-producing operations of Columbia be impaired, but the regulations would so imperil its entire network business that the inevitable result would be a lowering of program standards with consequent deterioriation of the value of radio broadcasting as a medium for the dissemination of news, information, ideas and entertainment to the public.

It follows that, unless the validity of the Commission's order is unassailable, Columbia is entitled to an injunction.

Specification of Errors

The District Court erred (see Assignment of Errors, R. 497-498):

In ruling that the Commission's orders were within the authority committed to it by Section 303 (i) of the Act.

In ruling that the Commission's orders were within the authority committed to it by the Act as a whole.

In failing to rule that the Commission based its orders upon an erroneous interpretation of the extent of its power and duty under the Act.

In failing to rule that the Act, as construed by the court, is an unlawful delegation of legislative power in contravention of Article 1, Section 1 of the Constitution of the United States.

In failing to rule that, if the Act is held to justify the Commission's orders, it abridges the freedom of speech or of the press, in violation of the First Amendment thereto.

In failing to rule that the Commission's orders are arbitrary and capricious.

In failing to order a trial.

In dismissing the complaint.

In failing to grant the application for preliminary injunction.

ARGUMENT

FIRST: The Commission's regulations are beyond the regulatory power committed to it by the Communications Act of 1934.

The question is whether the regulatory power of the Commission extends to control of the kind of contractual terms which a network organization may make with its affiliated stations as consideration for its furnishing them with a dependable supply of network programs. The Commission had no regulatory power at all over the network organizations as such. It accordingly attempted to accomplish its actual purpose, to get at the network organizations, by prescribing regulations ostensibly directed at the stations.

As this Court said on the former appeal (316 U. S. 407, 416-417):

> "The Commission's investigation of the contractual relations between the networks and the stations, which resulted in the order now under attack, was for the stated purpose of prescribing regulations of such relationships. The order authorizing the investigation recited that the proceeding was taken under § 303 (i) of the Act, which gives the Commission 'authority to make special regulations applicable to radio stations engaged in chain broadcasting.' Since the Commission is not in terms given authority to regulate contractual relations between the stations and the networks, regulation of them could be accomplished only by regulating licensed radio stations which participate in chain broadcasting. It was by regulations in terms applicable to such stations that the Commission sought to control their contractual relationships with the networks."

Accordingly the question which this Court must now decide is whether the Commission's "stated purpose" to "regulate contractual relations between the stations and the networks" may, consistently with the terms of the Act, be accomplished through the promulgated regulations.

Certainly the Commission is not "in terms" given authority to regulate the contractual relations of stations any more than it is to regulate those of networks. There are express provisions authorizing regulation of the conduct of stations in many aspects specifically described, but none of these subjects is even remotely similar to that of the contracts or other arrangements by which stations secure program material. The sole question is whether regulatory power over such matters may reasonably be implied from the other provisions of the Act.

We submit that such an implication of authority would be inconsistent with the purposes for which the Commission's regulatory powers were granted, and with the fair intendment of the provisions of the Act conferring those powers. If the Commission were held to have regulatory power of the breadth indicated by the opinion of the court below, and required to sustain these regulations, the result would be that this Commission, whose powers are apparently limited to specified subjects, would become the repository of regulatory control over an industry expressly declared by Congress not to be a public utility (Section 3(h)), which are broader than those customarily accorded to administrative agencies charged with the regulation of common carriers and other utilities.

The philosophy of the regulatory system established by the Act, so far as it related to broadcasters, was explained by this Court in *Federal Communications Commission* v. *Sanders Bros. Radio Station*, 309 U. S. 470, 474-475, as follows:

> "The genesis of the Communications Act and the necessity for the adoption of some such regulatory measure is a matter of history. The number of available radio frequencies is limited. The attempt by a broadcaster to use a given frequency in disregard of its prior use by others, thus creating confusion and interference, deprives the public of the full benefit of radio audition. Unless Congress had exercised its power over interstate commerce to bring about allocation of available frequencies and to regulate the employment of transmission equipment the result would have been an impairment of the effective use of these facilities by anyone. The fundamental purpose of Congress in respect of

broadcasting was the allocation and regulation of the use of radio frequencies by prohibiting such use except under license.

In contradistinction to communication by telephone and telegraph, which the Communications Act recognizes as a common carrier activity and regulates accordingly in analogy to the regulation of rail and other carriers by the Interstate Commerce Commission, the Act recognizes that broadcasters are not common carriers and are not to be dealt with as such. Thus the Act recognizes that the field of broadcasting is one of free competition. The sections dealing with broadcasting demonstrate that Congress has not, in its regulatory scheme, abandoned the principle of free competition, as it has done in the case of railroads, in respect of which regulation involves the suppression of wasteful practices due to competition, the regulation of rates and charges, and other measures which are unnecessary if free competition is to be permitted.

An important element of public interest and convenience affecting the issue of a license is the ability of the licensee to render the best practicable service to the community reached by his broadcasts. That such ability may be assured the Act contemplates inquiry by the Commission, *inter alia*, into an applicant's financial qualifications to operate the proposed station.

But the act does not essay to regulate the business of the licensee. *The Commission is given no supervisory control of the programs, of business management or of policy.* In short, the broadcasting field is open to anyone, provided there be an available frequency over which he can broadcast without interference to others, if he shows his competency, the adequacy of his equipment; and financial ability to make good use of the assigned channel."

No other conclusion could have been reached consistently with the terms of the Act. All of the provisions describing the matters with respect to which the Commission is authorized to regulate the conduct of licensed stations are comprehended in the eighteen lettered subdivisions of Section 303 (Appendix, pp. ii-v).

We postpone, for the moment, discussion of subdivision (i), under which the Commission commenced these proceedings and which is chiefly relied upon by it, and subdivision (g) which the opinion of the court below also emphasized. The subjects of regulation authorized by the other subdivisions are exceedingly specific,—so specific that it is reasonable to infer that, if Congress had intended to cover the subject of contracts for program material, it would not have left it to dubious implication.

These other subdivisions authorize the regulation of matters related to the prevention of interference and the technical competence of the operation of the station. Eleven of them, subdivisions (a), (b), (c), (d), (e), (h), (j), (n), (o), (p) and (q), relate solely to purely technical matters. The Commission is authorized "from time to time, as public convenience, interest, or necessity requires" to: Classify radio stations (a); prescribe the nature of the service to be rendered by stations (b); assign bands of frequencies and determine the stations' power (c); determine the location of stations (d); regulate the kind of apparatus to be used "with respect to its external effects and the purity and sharpness of the emissions" (e); establish areas or zones to be served by the stations (h); make general rules and regulations requiring stations to keep records of programs, transmissions of energy, communications and signals (j); inspect all radio installations for the purposes stated (n);

designate call letters of stations (o); cause to be published such call letters and such other announcements and data as may be required for the efficient operations of the stations (p); and require painting or illumination of radio towers which may constitute a menace to air navigation (q). Two other subdivisions, (l) and (m), deal solely with operators' licenses, again predominantly, if not wholly, on technical grounds; and a third, (k), deals with a special situation having no relevance to the subject-matter here involved.

Aside from (i) and (g), therefore, there are two more subdivisions, (f) and (r), and the Commission bases a subordinate argument on each of them (Commission's Report, p. 85, R. 141). They read as follows:

> "(f) Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this Act: *Provided, however*, That changes in the frequencies, authorized power, or in the times of operation of any station shall not be made without the consent of the station licensee unless, after a public hearing, the Commission shall determine that such changes will promote public convenience or interest or will serve public necessity, or the provisions of this Act will be more fully complied with;"

> "(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party."

The phrase relied upon by the Commission is "to carry out the provisions of this Act". It is used in (f) in a context of prevention of interference and in (r) in a context relating to international radio treaties or conventions. Apart from this, reliance on the phrase is sheer question-begging. If no authority to regulate the contractual provisions whereby broadcasting stations assure themselves of program material from national networks may be spelled out of the other provisions of the Act, manifestly such authority cannot be implied from a mere permission to make regulations "to carry out" such other provisions. The phrase relied on confers no independent power.

We thus come to subdivisions (i) and (g) of Section 303.

Section 303 (i):

This subdivision provides that the Commission, subject to the qualification with which the entire Section 303 is introduced, "from time to time as public convenience, interest, or necessity requires", shall

> "Have authority to make special regulations applicable to radio stations engaged in chain broadcasting."

The Commission interprets this language as intending a power to regulate the conduct of stations affiliated with network organizations in any way, without limitation of subject-matter, which it deems would promote the public convenience, interest, or necessity. But, even without the aid of the legislative history about to be discussed, this is an inadmissible construction. The very fact that its language is so unspecific, in contrast to the very specific terms of the

other subdivisions with which it is surrounded, warns that its intended content must be found by reference to the context in those other subdivisions. The word "special" is, we submit, the key to its true construction. The meaning is that regulations of the same sort described in the other subdivisions may be adopted to apply, not generally to all licensed stations, but "specially" to those engaged in chain broadcasting. There is nothing to justify implication of a power of regulation wholly different, not only in extent but in kind, from that included in the balance of the section.

The legislative history shows that subdivision (i) was in fact enacted to authorize the Commission to deal with a single specific problem of a technical operating nature. That problem related wholly to interference of a "special" sort involving only chain stations, and involving them only when they were "engaged in chain broadcasting". The problem arose on complaints of "independent" stations that chain stations, because of their high power and the fact that many of them were located in cities not far distant from each other, when they all simultaneously broadcast the same program, drowned out weaker stations entirely and, because of the inadequacy of the selective and tuning features of receiving sets then in use, made it impossible for listeners in many extensive areas to get any program except the chain program, on ordinary receiving sets. This was commonly referred to as "monopolizing the air" on the part of the chain stations * It had nothing to do with the arrangements by which chain stations got the chain program material, or to any contractual provisions in that connection.

*This explains why the Commission is able to refer to passages in the legislative history where "monopolization" is spoken of in connection with Section 303(i), which was Section 4 (h) of the 1927 Act. (See Rep. p. 86, R. 142.)

Title III of the Communications Act of 1934 was, substantially speaking, a re-enactment of the Radio Act of 1927 and hence the most extensive as well as the most significant history is that of the 1927 Act. Prior to the enactment of the 1927 law, the allocation of frequencies was under the jurisdiction of the Secretary of Commerce, under the Radio Act of 1912, which provided no adequate machinery for discrimination between applicants. During the years prior to 1927 several bills were introduced in Congress for the primary purpose of providing means for dealing with the confused and chaotic conditions which resulted.

The problem above described had been extensively discussed in the Senate Committee on Interstate Commerce prior to the introduction of the bill (H. R. 9971, 69th Cong., 1st Sess. (1926)) which, as amended, became the Radio Act of 1927. It had not been presented to the House of Representatives, in which that bill originated. The Senate discussion was in hearings on the bill S. 1754 which, as well as S. 1, had been introduced in the First Session of the Sixty-Ninth Congress, in which H. R. 9971 was later introduced.*

In the course of the Senate Committee hearings, Senator Dill said (Report of Hearings before Senate Committee on Interstate Commerce on S. 1 and S. 1754, 69th Cong., 1st Sess. (1926), p. 123):

> "SENATOR DILL. I want to ask Judge Davis [the Solicitor of the Department of Commerce] a question about another subject not covered in this bill, but which I want to have considered; and that is the subject of chain broadcasting. During the past few months there has grown up a system of chain broad-

*E.g. see Report of Hearings before Senate Committee on Interstate Commerce on S. 1 and S. 1754, 69th Cong., 1st Sess. (1926), pp. 123-124, 154, 169-171, 213.

casting, extending over the United States a great deal of the time. I say a great deal of the time—many nights a month—and the stations that are connected are of such widely varying meter lengths that the ordinary radio set that reaches out any distance is unable to get anything but that one program, and so, in effect, that one program *monopolizes* the air. I realize it is somewhat of a technical engineering problem, but it has seemed to many people, at least many who have written to me, that when stations are carrying on chain programs that they might be limited to the use of wave lengths adjoining or near enough to one another that they would not cover the entire dial. I do not know whether legislation ought to restrict that or whether it had better be done by regulations of the department. I want to get your opinion as to the advisability in some way protecting people who want to hear some other program than the one being broadcast by chain broadcast."

Considerable discussion ensued between Senator Dill and Solicitor Davis on this subject (*id.*, pp. 123-124). Later in the hearings, during the testimony presented by Norman Baker, then President of "American Broadcasters", there occurred the following colloquy between him and Senator Dill (*id.*, p. 169):

"SENATOR DILL: As I understand, Mr. Baker, you do not object to the chain system; it is to the large stations being put in the chain?

MR. BAKER: I do not object to chain stations, no. It is an advancement, but to say that two stations can be connected together with two telephone wires; that is nothing new. But I do object to this, that you have America there, and you can plant two stations geographically located that they have special benefit over 500 watters in this bill, and I say they

> can't go over 500 watts doing simultaneous broadcasting of the same program. Then you can connect 500 of them if you want to, because I, with an independent 500, can go just as strong as you can with yours. But what have they done? Not only that there shall be 5,000 watts in that station, but make a ruling that they can't be located closer than 500 miles apart. Chicago, 5,000 watts; 212 miles west to Davenport, 5,000 watts. Up there at Minneapolis, I don't know how far, 5,000 watts. Can you tell me the necessity of 5,000 watts chained together with a station not over 300 miles apart?"

Later (*id.*, p. 183). Mr. Baker proposed an amendment to S. 1754 which would have added to the provision which in that bill corresponded to the first sentence of the present Section 313, discussed in the next point, the following:

> "* * * and [the anti-trust laws] are hereby made to apply to the use of the ether for the transmission of radio communications as herein defined, and it is hereby declared to be an illegal combination in restraint of trade for two or more radio stations to simultaneously broadcast the same program unless the stations so broadcasting the same program shall use wave lengths within ten (10) meters in length of the wave length of each and every and all other stations simultaneously broadcasting the same program, or shall not use over 500 watts of power while so broadcasting." (See also *id.*, p. 170.)

A prohibitory amendment in the same vein was also proposed by W. J. H. Strong, testifying on behalf of the Chicago Federation of Labor (*id.*, p. 213).

In the debates in the House of Representatives on the later H. R. 9971, Congressman Celler read to the members of the House a letter from the Chicago Federation of Labor

(67 Cong. Rec., 69th Cong., 1st Sess. (1926), p. 5487), and Congressman Johnson of Texas one from a Texas farmer (*id.*, p. 5558), urging similar remedies, the latter terming the existing situation as "monopoly". But none of these proposals were incorporated into the bill, and H. R. 9971 passed the House of Representatives without any provision specifically dealing with stations engaged in chain broadcasting.

The bill then went to the Senate, which, as part of its proposed amendments, incorporated a section, Section 1(C), which made provision to guard against the practices complained of in its hearings. Doubt had developed regarding the technical practicability of the specific solutions embodied in the provisions of the several amendments proposed to S. 1754. The Senate dealt with it by providing that the Commission, from time to time, as public convenience, interest, or necessity required, should:

> "When stations are connected by wire for chain broadcasting, determine the *power* each station shall use and the *wave lengths* to be used *during the time* stations are so connected and so operated, and make all other regulations necessary in the interest of equitable radio service to the *listeners in the communities or areas affected* by chain broadcasting." (Rep. p. 86, R. 142).

It was with respect to that language, obviously limited to the technical problem of interference, that the Senate Committee on Interstate Commerce used the phrase which the Commission quotes in its Report (*ibid.*) that this provision gives to the Commission "complete authority * * * to control chain broadcasting" (Senate Report No. 772, 69th Cong., 1st Sess. (1926), p. 3). The meaning of course

was that the provision gave complete authority with respect to the specific problem which the Senate intended to meet, the House having taken no interest in it at all.

The bill passed the Senate in that form and then went to Conference. It was the Conference Committee that revised the subdivision and reported it back in the form in which it finally became law as Section 4(h) of the Act of 1927, which is identical with Section 303(i) of the Act of 1934.

That the purpose of dealing with the technical problem alone remained the same is completely borne out by the Conference Report, which was submitted to the Senate by Senator Dill and to the House by Congressman Scott (Senate Document 200, House Report No. 1886, 69th Cong., 2d Sess. (1927), p. 17) and which stated in part as follows:

> "* * * The jurisdiction conferred in this paragraph is substantially the same as the jurisdiction conferred upon the commission by section 1(C) of the Senate amendment. * * *"

The opinion of the court below (R. 485-486) did not base its construction of Section 303(i) to any considerable extent, if at all, on any idea that the more general language in which the subdivision finally passed Congress meant anything different from that in which it was introduced in the Senate. Its view was rather that the Senate language was not limited, as we contend, to the special interference problem. The court below said (R. 485):

> "The first clause of this amendment was indeed limited as the plaintiffs say; but the same was not true of the second clause. 'Equitable radio service to the listeners' was a comprehensive phrase. Read most

naturally, it should include the best possible service compatible with such burdens as it was reasonable to impose upon the 'networks' and their 'affiliates'—'equitable,' that is, in the sense that the interests of both were to be weighed. The fact that the occasion for the amendment appears to have been the Senate's apprehension that the 'networks' might drown out 'unaffiliated' stations by no means circumscribed the scope of these words."

We submit that this construction is wholly erroneous. The maxim *"noscitur a sociis"* should be enough in itself to preclude an interpretation which would authorize the Commission to impose upon networks and affiliated stations "burdens" which have no relations to the problem which had brought the provision into being, and no relation either to the purpose and scope of the regulatory power as disclosed in Section 303 as a whole. Moreover, the phraseology of the second clause itself, upon which the court below bases its broad construction, is significant. The words "all other regulations necessary in the interest of equitable radio service to the *listeners in the communities or areas affected* by chain broadcasting" were appropriate to a provision dealing with a particular evil *effect* of chain broadcasting upon listeners in those communities and areas. The intended meaning was that, if regulation of other things than power and wave-lengths were required to permit listeners to tune in on stations other than those of the chain, they might be included. Conceivably, such other things could have included antenna design and location, type of transmitting and control equipment, and other factors which, together with power and wave length, largely determine the coverage pattern of a radio station. If the intent had been to confer authority on the Commission, not only to see that

independent as well as chain programs could be heard, but also to regulate the arrangements whereby stations might obtain chain programs, quite different phrases would have been used.

Our construction, that the authority conferred by the subdivision was intended by Congress to comprehend solely the special interference problem above described, is borne out by the following statement of Senator Dill in the course of the debates in the Senate on the Conference bill:

> "MR. DILL. What is happening to-day is that the National Broadcasting Co., which is a part of the great Radio Trust, to say the least, if not a monopoly, is hooking up stations in every community on their various wave lengths with high-powered stations and sending one program out, and they are forcing the little stations off the board so that the people can not hear anything except the one program.
>
> "There is no power to-day in the hands of the Department of Commerce to stop that practice. The radio commission will have the power to regulate and prevent it and give the independents a chance." (68 Cong. Rec., 69th Cong., 2d Sess. (1927), p. 3031).

We submit that the above is a demonstration that the natural interpretation of Section 303 (i), that the "special regulations" intended thereby are limited to regulations of the same general character comprehended in the other subdivisions of the section, is the correct interpretation. Section 303 (b), (c), and (e) give the Commission regulatory power over the nature of the service, the frequencies, and the power of, and the apparatus to be used by, stations generally. Section 303 (i) authorizes it to make special regulations on those subjects applying to chain stations when engaged in chain broadcasting.

Section 303 (g):

By subdivision (g) of Section 303 the Commission was authorized to:

> "Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest;"

This subdivision was added by the 1934 Act. The court below apparently regarded it as increasing mightily the powers of the Commission as expressed in the 1927 Act. Tacitly conceding that the first two clauses, "Study new uses for radio" and "provide for experimental uses of frequencies", were limited to technical and scientific matters, it held (R. 486):

> "We can see no reason for confining the last clause to scientific or engineering problems; the purpose is apparently to give the Commission power to foster the industry *in all appropriate ways*. It is not clear that this was a new purpose; but if it was, it *infused* the powers already granted in the earlier act, broadening them in accord with the *changed* outlook—the power granted under subdivision 'i' among the rest."

The court thus held that Congress meant by the vague and general phrase "generally encourage the larger and more effective use of radio in the public interest" to enlarge the scope of the regulatory power of the Commission to embrace wholly undefined subjects,—any subject in fact that the Commission thought had any relation to the public interest.

We submit that this was a wholly inadmissible interpretation. All applicable canons of construction preclude

the implication of such a breadth of power from a general phrase following and surrounded by exceedingly specific ones. It is very like the general phrases in subdivisions (f) and (r) above discussed.

There is in Title II a provision the purpose of which seems substantially similar to that of Section 303(g) in Title III. Section 213 provides in part:

> "The Commission may inquire into the management of the business of all carriers subject to this Act, and shall keep itself informed as to the manner and method in which the same is conducted and as to technical developments and improvements in wire and radio communication and radio transmission of energy *to the end that the benefits of new inventions and developments may be made available to the people of the United States.*"

Manifestly, the general expression, emphasized in the above quotation, of a purpose that the benefits of new inventions and developments in wire and radio communication and radio transmission of energy may be made available to the people of the United States, does not add new powers to those conferred in the other sections of Title II. No more, we submit, should be implied from the general authority to "encourage the larger and more effective use of radio in the public interest," in Section 303(g).

The legislative history of Section 303(g) discloses nothing to indicate that Congress conceived the final clause as having any such significance as the court below ascribes to it. It originated in a bill, S. 2910 (73rd Cong., 2nd Sess. (1934)), of which S. 3285 (73rd Cong., 2nd Sess. (1934)), which became the Communications Act of 1934 was a revi-

sion. The first mention of this subdivision was in the course of hearings before the Senate Committee on Interstate Commerce on S. 2910, where it was discussed as being the same sort of general legislation as Section 218 in Title II, above quoted. (Report of Hearings before Senate Committe on Interstate Commerce on S. 2910, 73rd Cong., 2nd Sess. (1934), pp. 84-88). Subsequently, it was supported by a representative of the United States Navy on the ground of the dependence of the Navy and its Air Force upon radio communication and the importance of the Commission's "encouragement and development" thereof (*id.*, pp. 161-162; Report of Hearings before House Committee on Interstate and Foreign Commerce on H. R. 8301, 73rd Cong., 2nd Sess. (1934), pp. 21-22). It is fair to say that the entire discussion of the proposed clause indicated an assumption that the encouragement contemplated by the final clause was to be along scientific, technical and engineering lines, just as the court below assumes that the first two clauses were to be.

A Congressional intention to interfere with liberty of contract is never lightly to be assumed. Even more inadmissible is an interpretation which, by dubious implication, would confer upon an administrative agency power to abrogate existing and subsisting contracts. Provisions having that effect appear chiefly, if not exclusively, in legislation providing for regulation of common carriers and other public utilities. And, even in them, it is expressly granted.

In this very Act, in Title II, dealing with common carriers, there are provisions prescribing required service and charges (Sec. 201), and forbidding discrimination and preference (Sec. 202), of a sort which curtail liberty of contract

and often interfere with the performance of contracts existing at the time of the passage of the legislation. But these powers are expressly given, and the machinery for the enforcement of their requirements and prohibitions meticulously described.

The Act, in fact, contains cogent internal evidence that Congress did not intend to grant power to interfere with liberty of contract or abrogate existing contracts on any subject not specifically dealt with. Section 215(c) provides:

> "The Commission shall examine all contracts of common carriers subject to this Act which prevent the other party thereto from dealing with another common carrier subject to this Act, and shall report its findings to Congress, together with its recommendations as to whether additional legislation on this subject is desirable."

Congress thus specifically referred to the possibility that it might desire to regulate contracts of the sort described (the grounds of possible objection to which were generally similar to those which would apply to the contractual provisions denounced by the Commission here), but indicated that it would itself later decide the matters of policy involved. So, for additional examples, the Clayton Act and the Robinson-Patman Act prescribe the standards by which the permissibility of contractual provisions are to be judged.

The court below, however, puffs up a wholly indefinite phrase into a power to abrogate any and all contracts, on any subject, which the Commission may conclude affect, in undefined ways, the public interest generally. It is inconceivable, we submit, that Congress would have conferred

a power of such breadth without establishing the standards by which the validity of the contracts was to be judged.

It follows that there is no provision in the Act giving the Commission any regulatory power over the subject-matter of this order.

As if in recognition of that, the Commission grasped at its power, conferred by other sections of Title III, to deny licenses or the renewal of licenses. Its proposition necessarily is that it may use that licensing power as a weapon to coerce stations into submitting to regulation on subjects over which the Commission has been given no regulatory power.

The Commission had not originally intended to proceed in this way. This proceeding was begun under Section 303(i) and the regulations first suggested on November 28, 1940 (Ex. F to Complaint, R. 43-46) said nothing about denial of licenses or of renewals of licenses. They read:

> "No licensee of a standard broadcast station *shall enter into* any contractual arrangement, express or implied, with a network organization" [which contains any of the disapproved provisions].

The object and effect of such a regulation would have been to continue the station as a licensee and regulate its business practices directly. But, after six months of reflection, the regulations were changed to their present form.

But this shift of position encounters other difficulties, which we discuss in the next point.

SECOND: The Commission has no authority under its licensing power to promulgate regulations providing for the denial of renewals of licenses to stations having affiliation contracts with network organizations containing provisions deemed by it to be restrictive of competition.

The Commission determined to establish a policy with respect to network contracts that the facilities of all broadcasting stations should be open to all programs offered from any source; that any "affiliation" between stations and network organizations should be of short duration and so loose that it would involve nothing restraining the freedom of the station in that regard or giving any preference to the network organization with which it had that relation.

The Commission's entire Report, so far as it deals with other than factual matters (pp. 46-89, R. 102-145), represents a search for some provision in the Act which would justify it in regulating network contracts so as to enforce that policy. It first sought to find such authority in the regulatory power given it by Section 303, from the special power with respect to stations engaged in chain broadcasting expressed in subdivision (i) and from strained implications from indefinite phrases in subdivisions (f), (g) and (r). It then sought to find, by equally strained implications from certain sections dealing with licensing of stations and transfers of station licenses, a power to establish the policy by general regulations that "no license shall be granted to a standard broadcast station" which has a contract with a network organization containing provisions of

a character deemed inconsistent with that policy. It is with the latter search that this point is concerned.

Our position is that there is nothing in the Act giving the Commission authority to establish its policy through its licensing power, any more than there is to do so through its regulatory power, and that, if the policy is to be established it must be by further Congressional action.

The general provisions regarding licensing are found in Sections 307, 308 and 309 of the 1934 Act. The initial provision is in subdivision (a) of Section 307, as follows:

> "The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this Act, shall grant to any applicant therefor a station license provided for by this Act".

The qualifications on this general mandate arise from the physical fact that the number of available frequencies is limited. Subdivision (b) of Section 307 provides that "the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several states and communities as to provide a fair, efficient and equitable distribution of radio service to each of the same". And even in the same state or community the Commission must select from all the applicants the best qualified operators. The considerations upon which this selection is to be made appear in the enumeration in Section 308 (b) of the things into which the Commission is to inquire in passing upon applications. It provides:

> "All such applications shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate

> the station; the ownership and location of the proposed station and of the stations, if any, with which it is proposed to communicate; the frequencies and the power desired to be used; the hours of the day or other periods of time during which it is proposed to operate the station; the purposes for which the station is to be used; and such other information as it may require. * * *"

That the considerations which may properly influence the Commission in the exercise of its licensing power are of limited scope is confirmed by the opinion in *Federal Communications Commission* v. *Sanders Bros. Radio Station*, 309 U. S. 470, 474-5 (quoted *supra*, pp. 22-23). This shows clearly that the licensing power was not given to permit the Commission to exercise a "supervisory control of the programs, of business management of policy", of the licensees. It was certainly not given with any purpose of authorizing the Commission to impose upon the broadcasting industry any predetermined policy of its own with respect to relationships between network organizations and their affiliated stations.

This Court held several years before the *Sanders Bros.* case that the standard of "public convenience, interest, or necessity" was not intended to be of undefined scope. In *Federal Radio Commission* v. *Nelson Brothers Bond & Mortgage Co.*, 289 U. S. 266, 285, it said:

> "* * * This criterion is not to be interpreted as setting up a standard so indefinite as to confer an unlimited power. Compare *N. Y. Central Securities Co.* v. *United States*, 287 U. S. 12, 24. The requirement is to be interpreted by its context, by the nature of radio transmission and reception, by the scope, character and quality of services, and, where

> an equitable adjustment between States is in view, by the relative advantages in service which will be enjoyed by the public through the distribution of facilities. * * *"

In *New York Central Securities Corp.* v. *United States*, 287 U. S. 12, cited in the above quotation, this Court said (p. 24):

> "* * * It is a mistaken assumption that this [criterion of public convenience, interest, or necessity] is a mere general reference to *public welfare* without any standard to guide determinations. * * *"

The "context" of which this Court spoke in the *Nelson Brothers Bond & Mortgage Co.* case is found chiefly in the specifications of the Commission's regulatory power in Section 303 and the provisions, just above quoted, in Section 308(b) prescribing the contents of an application for license.

Besides the above-mentioned provisions there are sections which deal with the Commission's action on license applications in specified particular conditions. One of these is Section 310 which expressly limits the Commission's power by providing that a license shall not be "granted to or held by" alien interests as therein described. Another particular provision is that contained in Section 311, relied on by the Commission and the court below, to which extended reference will hereafter be made.

In groping for statutory backing for the use of its licensing power to regulate the terms of network contracts, the Commission first attempts to derive from certain provisions of the Act what it has called a "principle of licensee responsibility". It states this in its Report as follows (p. 66, R. 122):

"It is the station, not the network, which is licensed to serve the public interest. The licensee has the duty of determining what programs shall be broadcast over his station's facilities, and cannot lawfully delegate this duty or transfer the control of his station directly to the network or indirectly to an advertising agency.

* * * * * *

"We conclude that a licensee is not fulfilling his obligations to operate in the public interest, and is not operating in accordance with the express requirements of the Communications Act, if he agrees to accept programs on any basis other than his own reasonable decision that the programs are satisfactory.

* * * * * *

"These are principles of general application based on sections 301, 309, and 310 of the Communications Act."

Section 301 is simply the introductory section of Title III stating it to be the purpose of the Act to maintain the control of the United States over all the channels of interstate and foreign radio transmission, and "to provide for the use" of such channels "by persons for limited periods of time, under licenses granted by Federal authority". The section prohibits the use or operation of any apparatus for interstate radio transmission except under license.

The provision of Section 309 relied on is subdivision (b)(2) that every license shall contain the condition that "neither the license nor the right granted thereunder shall be assigned or otherwise transferred in violation of this Act". And the pertinent provision of Section 310 is that of subdivision (b) that the license and the rights therein granted "shall not be transferred, assigned, or in any man-

ner either voluntarily or involuntarily disposed of, * * * to any person, unless the Commission shall, after securing full information, decide that said transfer is in the public interest, and shall give its consent in writing".

Obviously no support for the policy embodied in the regulations here in question can be implied from these provisions. The station's agreement to broadcast the commercial programs furnished to it by the network organization with which it is affiliated, and under certain conditions to displace other programs to make way therefor, subject in each case to the station's right of rejection of any program not in the public interest (R. 13), involves no abdication by the licensee of control over the station. It is an exercise by the station of its responsibility as licensee to assure to the listening audience served by it an adequate supply of superior program material.

The Commission does not really stand on the thesis expressed in the passage from its Report above quoted. The Report as a whole, and the regulations themselves, show that it has no objection to a station licensee making a firm contract with a network organization in advance to broadcast its programs. The regulations are directed at the exclusive and preferential features of the affiliation contract whereby the affiliated station agrees not to broadcast the programs of any *other* network and to give its own network the right to displace other programs on 28 days' notice. In the Commission's report on the rehearing (R. 26) it said that the regulations "neither in their original form nor as herein amended, place any restrictions upon the *bona fide* purchase of station time by networks". All that the Commission insists upon, on the score of licensee responsibility, is that the station retain a right to reject an unsatisfactory network program and to substitute for

network programs features of outstanding national or local importance. And that right is reserved to Columbia's affiliates in paragraph 2 of the affiliation contract (Ex. A to Complaint, R. 13).

Next the Commission appeals to what it calls a "principle of maximum use of facilities", which it attempts to derive (Rep. pp. 80-81, R. 136-137) from Section 1 of the Act and Section 303 (g).

Section 1 of the Act simply states the general objectives thereof as being "to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service"; and Section 303 (g) has already been discussed. The proposition which the Commission seeks to derive from these sections is thus stated in its Report (p. 81, R. 137):

> "* * * With the number of radio channels limited by natural factors, the public interest demands that those who are entrusted with the available channels shall make the fullest and most effective use of them. * * *
>
> "It is no answer to say that the network stations render better service to the public than do unaffiliated stations. * * * The Commission's licensing function is not limited to determining simply whether the service of one station is satisfactory *as compared* with that of other stations. The Commission has the duty to grant licenses and renewals *only* to those applicants who propose a *maximum* utilization in the public interest of the facilities they request."

We deny that the Communications Act contemplates any such academic standard as that indicated in the above-quoted passage. As to technical matters, such as the efficiency of

an antenna, it may be that the Commission is authorized to deny a renewal of a license if the licensee, after appropriate warning, persists in the use of a design which is outmoded when a more efficient design is available at reasonable cost, and another applicant is before the Commission for the same frequency who is prepared to give better service. Power over the licensee as to such matters is expressly given in Section 303 (e) which authorizes the Commission to "Regulate the kind of apparatus to be used with respect to its external effects and the purity and sharpness of the emissions from each station and from the apparatus therein". But unless the regulation of contracts for program service is within the scope of the Commission's authority, it is not its function to determine whether a station licensee in entering into such a contract has made the maximum use of its facilities or not. The Communications Act has left such problems of business management to the licensee who is the judge of the adequacy of his contracts for programs. Moreover it would be most unjust to the licensee to deny a renewal of his license upon the ground that he had not made a maximum utilization of his facilities in entering into a contract with Columbia or NBC unless there was proof available that he could have obtained a different contract from another source which was more advantageous to the public.

All of the affiliation contracts of which the Commission complains have been made because the stations, as a matter of business judgment, believed that thereby they could be assured of economic advantages and superior program material and thereby would better serve the listening public and so be able to compete more effectively. That such belief was justified is shown by the Commission's Report itself. After describing the value of network broadcasting

to the industry generally, and the improvements which attended its development, it said (Rep. p. 4, R. 60):

> "From an economic standpoint, the stations themselves are in a position to benefit greatly from their participation in chain broadcasting; such broadcasting can bring them a larger share of the money expended by advertisers for national or regional coverage.* * *"

The terms of the affiliation contracts denounced by the Commission are, generally speaking, the ones most vital to Columbia. There is nothing to indicate that the stations could have got their affiliation contracts without them.

The statutory purpose in licensing is to give service to the listening public, and select, on a comparative basis from among actual applicants, the one best qualified to give it. In *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, this Court said (footnote pp. 138-139) that:

> "Since the beginning of regulation under the Act of 1927 *comparative considerations* have governed the application of standards of 'public convenience, interest, or necessity' laid down by the law".

It then quoted with apparent approval an extract from the Second Annual Report of the Federal Radio Commission for 1928 (pp. 169-170) as follows:

> "* * * the commission desires to point out that the test—'public interest, convenience, or necessity'—becomes a matter of a *comparative* and not an *absolute* standard when applied to broadcasting stations. Since the number of channels is limited and the number of persons desiring to broadcast is far greater than can be accommodated, the commission

> must determine *from among the applicants before it* which of them will, if licensed, best serve the public. In a measure, perhaps, all of them give more or less service. Those who give the least, however, must be sacrificed for those who give the most. The emphasis must be first and foremost on the interest, the convenience, and the necessity of the listening public, and not on the interest, convenience, or necessity of the individual broadcaster or the advertiser."

These regulations would require denial of renewals to affiliated stations regardless of whether there were other equally competent, or any, applicants for licenses to take their places.

We are not here dealing with the disposition by the Commission of a particular license application where consideration may be given to the pertinent circumstances affecting the applicant and the service which the listening audience in its territory receives from the applicant and other stations serving the same territory. We are dealing with the validity of an order promulgating general regulations providing that in *no* circumstances will favorable consideration be given to a station which has certain provisions in its affiliation contract. Once the existence of such a contract appears, denial of renewal of the license follows automatically, as this Court recognized in its opinion upon the former appeal. No matter how strong may be the facts as to the qualifications of an applicant, in character and financial and technical ability, the excellence of its location and equipment, the efficiency of its operations and the satisfaction which its programs have given the listening public in its community, it will be put off the air unless it abrogates those contractual relations.

The validity of the order may be tested by what would happen to the listening public if either the affiliated stations

refused to submit to regulation of their contracts, or the network organizations refused to modify them, and the Commission had to make good on its threat. Several hundred stations would go off the air. The Commission does not deny that, speaking generally, they are intrinsically the strongest and most competent stations in the country, and those best qualified all-round to give satisfaction to the listening public. According to the Commission's own statements (Rep. pp. 51-52, R. 107-108) many of the stations affiliated with Columbia and NBC are the only stations serving large rural areas and many fair-sized cities. The importance, for example, of news broadcasts to such communities has already been pointed out (*supra*, p. 14). If these stations were denied renewals of their licenses, not only their network programs would go off the air but their non-network, local service as well.

We submit that such an order is no true exercise of the Commission's licensing function.*

Finally, the Commission grounds its asserted authority upon certain sections of the Act from which it attempts

*Under Section 309 (a), if the Commission upon examination of the application does not reach a decision that the license should be granted, it is obliged to give the applicant a hearing, after which the Commission is required to make specific findings. *Missouri Broadcasting Corp.* v. *Federal Communications Commission*, 94 F. (2d) 623 (C. of A., D. C.); *Saginaw Broadcasting Co.* v. *Federal Communications Commission*, 96 F. (2d) 554 (C. of A., D. C.), cert. den. *sub. nom.*, *Gross* v. *Saginaw Broadcasting Co.*, 305 U. S. 613. Such findings must of course relate to the interests of the listeners served by that particular station. If the decision of the Commission is adverse, Sections 402(b), (c), (d) and (e) provide for an appeal to the Court of Appeals of the District of Columbia. All of these provisions contemplate determination of the applicant's right to a license on facts related to his particular situation.

to imply a duty to promote competition throughout the broadcasting industry. It says (Rep. p. 82, R. 138):

> "The Commission's duty to act also flows from the fact that Congress expressly wrote into the act the requirement of free competition in the radio field. It provided in section 3 (h) that persons engaged in radio broadcasting should not be deemed common carriers. By section 313 it specifically made the antitrust laws applicable to persons engaged in radio communication and authorized the courts to revoke the license of any person found guilty of violating the antitrust laws. In section 311 it directed the Commission to refuse a license to any person whose license has been revoked by a court under section 313 and authorized the Commission to refuse a license to any person found guilty by a Federal court of having violated the antitrust laws with respect to radio communication. By section 314 it forbade persons engaged in radio communications from engaging in communication by wire, or vice versa, if the effect thereof is substantially to lessen competition or to restrain commerce. These elaborate provisions against restraints on competition leave no doubt that Congress intended to safeguard free competition in the radio broadcasting industry."

The Commission's thesis of a supposed duty with respect to competition is in fact the major premise of its Report, as we shall show in greater detail in Point Fourth (*infra*, pp. 71-76). (See particularly Rep. pp. 46-50, R. 102-106). But neither the sections cited, nor anything else in the Act, supports the regulations here involved.

Section 3(h) requires no discussion. It simply excludes broadcasters from the statutory definition of "common

carrier." It was only in connection with the distinction between Title II and Title III of the Act that this Court in the *Sanders Bros.* case used the expression, so persistently misapplied in the Commission's Report, that: "*Thus*, the Act recognizes that the field of broadcasting is one of free competition," (309 U. S., p. 474, *supra*, p. 23).

That expression did not mean that the Commission had either duty or authority to compel competition for its own sake. This Court (309 U. S., p. 475) after the passage earlier quoted that the Act does not "essay to regulate the business of the licensee" and that the "broadcasting field is open to anyone, provided there be an available frequency over which he can broadcast without interference to others, if he shows his competency, the adaquacy of his equipment and financial ability to make good use of the assigned channel" proceeded (pp. 475-476):

> "Plainly it is not the purpose of the Act to protect a licensee against competition but to protect the public. *Congress intended to leave competition in the business of broadcasting where it found it*, to permit a licensee who was not interfering electrically with other broadcasters to survive or succumb according to his ability to make his programs attractive to the public.
>
> "This is not to say that the question of competition between a proposed station and one operating under an existing license is to be entirely disregarded by the Commission, and, indeed, the Commission's practice shows that it does not disregard that question. It may have a vital and important bearing upon the ability of the applicant adequately to serve his public; it may indicate that both stations—the existing and the proposed—will go under, with the result that a portion of the listening public will be

> left without adequate service; it may indicate that, by a division of the field, both stations will be compelled to render inadequate service."

Thus the test is service to the listening public. The Commission is not to exercise its licensing function in such a manner as to impair the service to the listening public of a competent existing station just for the sake of creating a new and untried type of competition. And it should not be overlooked that there is a wide difference between the promotion of competition among stations which is inherent in the licensing of new stations, and attempting to promote competition among network organizations by regulation of the terms of network contracts. The power to license new stations is expressly given to the Commission, and the only question is whether such licensing in a particular case will serve the public interest, convenience or necessity in the statutory sense of this phrase. Here the Commission is not exercising its express power to license new stations. It is seeking to derive an implied power to regulate the terms of network contracts, which is no true exercise of its licensing power at all.

The right of "free competition" among stations which is preserved to the broadcaster by the Act involves the right, once licensed, to operate without governmental restrictions beyond those necessitated by technical requirements and general laws. If a station thinks that it can in the long run get a better or more diversified line of programs by affiliating with a network on the terms of the existing affiliation contracts, it is its right, subject to such laws, to do so. Any attempt by the *Commission* to restrict the business policies by which the station chooses the sources of its program material and otherwise conducts its operations would

be an unwarranted interference with its right freely to compete as contemplated by the Act.

The Commission concedes (Rep. p. 48, R. 104) the competition which exists between networks and between stations for advertisers and listening audiences. But it says, at the page cited:

> "* * * In the radiobroadcasting field, three different markets must be distinguished—the market in which networks and stations meet advertisers, the market in which networks and stations meet listeners, and the intermediate or internal market where stations meet networks. It is in this intermediate network-station market that current practices have most directly restrained competition; no considerations of the extent to which the networks may compete for advertisers or listeners can conceal the extent to which they do not compete in the network-station market."

But a theory that the Commission is entitled, by regulation or the use of its licensing power, to compel a larger measure of competition in what it calls the "network-station market", even at the expense of impairing the ability of the stations to compete most effectively in the other two markets which it recognizes, namely, the markets in which the stations compete for advertisers and for listeners, finds no support in the provisions of the Act, or the decisions of this Court construing it.

It being clear from the above that the Commission has no statutory duty or authority to exercise its licensing power so as to create new competitive conditions for network organizations, the remaining question is whether the statute gives it authority to deny renewals of licenses on

the sole ground that the applicants have engaged in practices which the Commission regards as restrictive of competition. The argument that it has, which the court below accepted, rests upon Sections 313 and 311. Section 314 is on its face so inapplicable to the subject-matter of the regulations here involved that it requires no discussion.

Section 313 (Appendix, p. ix) has no relation to the functions of the Commission. It speaks, not to the Commission, but to the Department of Justice, the Federal Trade Commission and the courts. It has nothing to do with licensing. Its first sentence, relied on by the Commission, reads:

> "Sec. 313. All laws of the United States relating to unlawful restraints and monopolies and to combinations, contracts, or agreements in restraint of trade are hereby declared to be applicable to the manufacture and sale of and to trade in radio apparatus and devices entering into or affecting interstate or foreign commerce and to interstate or foreign radio communications."

That means that, if any person, licensed or unlicensed (like a network organization), infringes the anti-trust laws, it may be proceeded against by indictment or suit in equity at the hands of the Department of Justice or cease and desist proceedings at the hands of the Federal Trade Commission.

The second sentence of the section provides that whenever, in any such suit or proceeding, any licensee shall be found guilty of a violation of the anti-trust laws, "the Court, in addition to the penalties imposed by those laws, may decree that its license be revoked". The court below recognized (R. 486) that such a revocation was simply an additional punishment imposed by the court for "past mis-

conduct". The juxtaposition of this second sentence confirms, if confirmation be needed, our view of the meaning of the first sentence.

Section 311 (Appendix, pp. viii-ix) is the only provision in the Act, relating to monopoly or restraint of trade, which has any bearing on the Commission's licensing function. And its application is extremely limited. The first sentence of that section, which is the one presently material, reads:

> "Sec. 311. The Commission is hereby *directed* to refuse a station license and/or the permit hereinafter required for the construction of a station to any person (or to any person directly or indirectly controlled by such person) whose license has been revoked by a court under section 313, and is hereby *authorized* to refuse such station license and/or permit to any other person (or to any person directly or indirectly controlled by such person) *which has been finally adjudged guilty by a Federal court of unlawfully monopolizing, or attempting unlawfully to monopolize*, radio communication, directly or indirectly, through the control of the manufacture or sale of radio apparatus, through exclusive traffic arrangements, or by any other means, or to have been using unfair methods of competition."

The first clause of that sentence, dealing with when the Commission is "directed" to deny a license, simply implements the authority given by Section 313 to a court to revoke a license as a part of the relief given in an anti-trust suit; and the second clause, stating the circumstances in which the Commission is "authorized" to deny a license, is limited to the case in which there has been an adjudication by a Federal court that the applicant has been guilty

of "unlawfully monopolizing, or attempting unlawfully to monopolize" or of using unfair methods of competition.

There has been no judicial determination that the provisions of the affiliation contracts which the Commission undertakes to proscribe are in violation of the anti-trust laws.*. The Department of Justice, the agency through which the anti-trust laws may, under Section 313, be applied to radio communications, has instituted suits against both Columbia and NBC and certain officers thereof, under the Sherman Act, Sections 1 and 2, to enjoin the defendants from continuing the very contractual provisions which the Commission here seeks to outlaw by indirection through regulations ostensibly directed at the stations (R. 284-300), but the suits have not yet reached trial.

If Congress had intended to give the Commission any power to deny a license in a case where it thought (in the absence of prior judicial determination) that the applicant had been guilty of unlawful monopoly or restraint of trade it would surely have said so. The authority embodied in the second clause would then have been wholly superfluous, for

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*The Commission does not even assert that in its judgment, if that were material, the conduct of the affiliated stations constitutes a violation of the anti-trust laws. It says (Rep. p. 83, R. 139):

"While many of the network practices raise serious questions under the antitrust laws [citing several decisions of the United States Supreme Court under the Sherman Act], our jurisdiction does not depend on a showing that they do in fact constitute a violation of the antitrust laws. It is not our function to apply the antitrust laws as such. It is our duty, however, to refuse licenses or renewals to any person who engages or proposes to engage in practices which will prevent either himself or other licensees or both from making the fullest use of radio facilities. This is the standard of public interest, convenience or necessity which we must apply to all applications for licenses and renewals."

the case of an actual adjudication of monopolization would be *a fortiori*. Sections 311 and 313 together show that in Title III Congress gave considered attention to the bearing of the anti-trust laws upon broadcasting matters, and wrote out with discriminating care the instances and ways in which they bore on the Commission's functions and authority.

Our contention as to the true intendment of the first sentence of Section 311 is further fortified by the implications of the second sentence, that the granting of a license "shall not estop" the United States or any person aggrieved, from proceeding against a licensee for violation of the anti-trust laws. It is at least some indication that Congress did not expect the Commission in passing on license applications to concern itself with the question whether the applicant's activities amounted to monopolization or restraint of trade unless there had been a judicial determination to that effect.

The court below construed Section 311 as conferring authority on the Commission to deny a license if *it* found that the applicant had in the past been guilty of monopolization or restraint of trade, even though there had been no prior judicial determination of violation of the anti-trust laws. The court predicated this conclusion upon the following line of reasoning (R. 486-488): The provision of Section 313, that a court might impose the additional penalty of revocation of a license as part of an anti-trust decree, was not given as a means of compelling a licensee to furnish service free from unlawful restrictions, but to punish him for his past misconduct; on the other hand the provision of Section 311, that the Commission was "authorized" to refuse a license where there had been prior judicial

determination of violation of the anti-trust laws, was certainly not to be used as a punishment, since the Commission was not to overrule a court which had decided not to impose the penalty of revocation; the sole use which the Commission was to make of the prior adjudication was by considering it as evidence that, if granted a license, he would not use it for the "public convenience, interest, or necessity"; and so would be an unfit licensee.

Apart from the fact, above adverted to, that under the plain words of the statute a prior judicial determination was a prerequisite of the Commission's authority in this regard, it is clear that the above progression of reasoning is predicated, in part at least, on a misapprehension on the part of the court below of the changes which the Act of 1934 made in Section 13 of the Radio Act of 1927 which corresponded with Section 311 of the Communications Act of 1934 (Section 15 of the 1927 Act corresponding with Section 313 of the 1934 Act). It proceeded on the assumption that the 1927 Act contained no provision as to what the Commission might do if a court had adjudged an applicant guilty of violating the anti-trust laws, but had refrained from imposing the additional punishment of revocation of the license. The court below said (R. 487):

> "Section 13 of the Radio Act of 1927 had provided that if a court revoked a license, the Commission must refuse to renew it, but it had *stopped there*; and, as the law then stood, it might perhaps have been argued with some show of plausibility that an applicant's monopolistic or unfair competitive practices in the past were not relevant to the grant of a license.
>
> "However that may have been, § 13 was amended in 1934 by adding a *new* clause, and the resultant § 311, in addition to retaining the old language forbidding the restoration of a forfeited license, contained a new one providing that the Commission is

'authorized to refuse such station license' whenever the applicant had been 'finally adjudged guilty' by a Federal court of * * * attempting unlawfully to monopolize radio communication * * * or to have been using unfair methods of competition.'"

We print the full text of Sections 13 and 15 of the Radio Act of 1927 in the Appendix (pp. x-xi).

Actually Section 13 contained no provision dealing specifically with the case in which a court had revoked a license pursuant to the provisions of the second sentence of Section 15. That was not necessary because the first sentence of Section 13 "directed" (and not merely "authorized" as in Section 311) the licensing authority to refuse a station license to any person who had been finally adjudged guilty by a federal court of violation of the anti-trust laws, whether or not the additional punishment of revocation of the license had been imposed by the court. The changes which Section 311 of the 1934 Act made in Section 13 actually were that in the case of a prior adjudication of guilt, without imposition by the court of the additional penalty of revocation, the Commission was only "authorized", not "directed", to refuse the license; and to add the new provision that, where the court had decreed a revocation, the Commission was "directed", and not merely authorized, to refuse the license.

This shows that, contrary to the supposition of the court below, Congress in enacting the 1927 law had given considered attention to the situation where a court had adjudged a violation of the anti-trust laws, without revoking the license. But, more importantly, it shows that Congress had carefully reconsidered that question in passing the 1934 Act.

It is true that the 1934 Act accorded the Commission some discretion in that situation, whereas the 1927 Act had

given it none. But that discretion was a one-way discretion. The Commission might conclude that the applicant's past violation of the anti-trust laws did not show unfitness of a character which should disentitle him to a license. But it did not, any more than did the 1927 Act, give the Commission discretion to conclude that practices which it thought amounted to monopolization or restraint of trade, without more, made him unfit for a license, in the absence of prior adjudication of a violation.

The fact of prior judicial determination is a *sine qua non* under Section 311 of the 1934 Act just the same as it is under Section 13 of the 1927 Act. Despite the court's observation (R. 488) that the Commission was no more "profane" an agency than a court with which to "entrust" the "mysteries enveloping an adjudication of 'guilt' under the anti-trust laws", the fact remains that Congress deliberately chose the courts. The very fact that Congress in 1934 reconstructed Section 311 so as to give the Commission discretion to grant a license in spite of a prior adjudication, but not to refuse one in the absence thereof, is eloquent of that intent.

Such intent is furthermore amply demonstrated by the legislative history of these sections as a whole. We have heretofore pointed out that prior to the introduction of H. R. 9971, which, as amended, became the Radio Act of 1927, several bills were introduced in Congress to amend or supplement the Radio Act of 1912 under which the allocation of frequencies was the responsibility of the Secretary of Commerce.* In these earlier bills Sections numbered

*Some of such early bills were: H. R. 13773, 67th Cong., 4th Sess. (1923); H. R. 11964, 67th Cong., 2nd Sess. (1922); H. R. 7357, 68th Cong., 1st Sess. (1924).

2(C) and 2(G), respectively, corresponded in content to Sections 13 and 15 of the 1927 Act. Section 2(G) involved no controversy and was always in substantially the same language in which it now appears in Section 313 of the 1934 Act. But Section 2(C) of the bills would have provided that the Secretary of Commerce should be authorized to deny a license when "in his judgment" the applicant was unlawfully monopolizing, rather than this subject being left to judicial determination.

All of the early bills failed of adoption. Secretary Hoover opposed the features thereof which committed administrative discretion to the Secretary. (See Report of Hearings before House Committee on Merchant Marine and Fisheries on H. R. 11964, 67th Cong., 4th Sess. (1923), p. 40). It was, however, in his remarks at the hearings on H. R. 7357 that his ideas on the subject were more fully developed. He said (Report of Hearings before House Committee on Merchant Marine and Fisheries on H. R. 7357, 68th Cong., 1st Sess. (1924), at p. 11):

> "* * * The determination of whether or not a given concern is attempting to set up an illegal monopoly in radio communication is dependent upon the ascertainment of a vast number of facts, and the determination of difficult legal questions. We have a conflict between the general American principle of opposition to monopoly and an equally American principle, recognized by our patent laws; that an invention belongs exclusively to him who makes it, which necessarily means an exclusive right in the inventor. The problem does not properly belong to *any* administrative body.
>
> "The Department of Commerce has no machinery with which to carry on the investigations nec-

essary, nor is its organization suited for the decision of such questions.* I much prefer the principle adopted in Section 2 (g) [permitting revocation of a license as part of the penalty upon judicial determination of violation] under which the law and facts applicable are determined judicially, and I would suggest that the bill be so amended that the refusal of a license to a monopoly be placed upon the same basis, and determined in the same manner as is the revocation of a license under this section."

Solicitor Davis of the Department of Commerce expressed similar views. (Report of Hearings before House Commit-

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*In the debates and hearings with respect to these bills many alleged evils were discussed, to all of which the term "monopolizing" was generally applied. Besides the interference problem of powerful stations operating in chains, which, as already pointed out, was the occasion for the enactment of Section 4(h) of the 1927 Act corresponding to Section 303(i) of the 1934 Act, other such evils to which Congress paid predominant attention were: (1) the pooling of patents for radio tubes and equipment by American Telephone & Telegraph Company, General Electric Company, Radio Corporation of America and certain other companies and the division among those concerns of the various functions in the radio industry, and the resulting high prices for radio sending and receiving equipment; and (2) the possibility that station licensees, by mere use of a particular frequency or wave length, would thereby acquire some vested interest or ownership therein, resulting in a perpetual "monopoly" by the first users of the few available wave lengths. (As to (1) see Report of Hearings before House Committee on Merchant Marine and Fisheries on H. R. 7357, 68th Cong., 1st Sess. (1924), pp. 40-49, 95-98; House Report No. 719, 68th Cong., 1st Sess. (1924), pp. 4-5; 68 Cong. Rec., 69th Cong., 2d Sess. (1927), 2579. As to (2) see *Tribune Co.* v. *Oak Leaves Broadcasting Station, Inc.* (unreported decision by Circuit Court, Cook County, Ill., Nov. 1926) holding that prior use of a particular wave length gave the user the right to be free from interference by later users; 15 Georgetown L. J. 474 (1937) and reference to case by Congressman White, 68 Cong. Rec., 69th Cong., 2d Sess. (1927), 2579).

tee on Merchant Marine and Fisheries on H. R. 7357, 68th Cong., 1st Sess. (1924), p. 210).

In the 69th Congress, 1st Session (1925), a radio bill, (H. R. 5589) was introduced in the House, and two other radio bills (S. 1 and S. 1754) were introduced in the Senate. Both H. R. 5589 and S. 1754 contained a provision complying with Secretary Hoover's suggestion. As to this the following colloquy occurred between Solicitor Davis of the Department of Commerce and members of the Senate Committee on Interstate Commerce, particularly Senator Dill (Report of Hearings Before Senate Committee on Interstate Commerce on S. 1 and S. 1754, 69th Cong., 1st Sess. (1926), p. 108):

> "Mr. Davis. Beginning on page 7 there is what might be called an antimonopoly clause, a provision that no radio license shall be granted to any person, firm, company, or corporation or any subsidiary thereof, that has been convicted in any court of the United States of unlawfully monopolizing or attempting to monopolize radio communication. That clause has received a good deal of consideration before the House committee. I have nothing in particular to say about it.
>
> "Senator Dill. You do not object to it?
>
> "The Chairman [Senator Watson]. Well, do you approve it?
>
> "Mr. Davis. I see no objection to it. It is, you will observe, an extremely stringent provision, in that, if I may express it that way, there is no opportunity for repentance; the corporation having been once found guilty is forever debarred from obtaining a license, although it may have ceased from its unlawful practices.
>
> "Senator Smith. Have you known many cases where they did cease?

"Mr. Davis. I think that under the Federal Trade Commission provisions, where they issue cease and desist orders they have been ceasing, yes; but anyway that is the effect of that provision.

"Senator Dill. *Well, it does not apply until they have been actually convicted?*

"Mr. Davis. It does not apply until they have been actually convicted."

Efforts to get into the Radio Act of 1927 a provision authorizing the Radio Commission, thereby constituted, to refuse a license when in the judgment of the Commission the applicant had monopolized or restrained competition, were also rejected. The report of the House Committee on Merchant Marine and Fisheries with respect to H. R. 9971 (House Report No. 464, 69th Cong., 1st Sess. (1926)), contains a lengthy minority report by Congressman Ewin L. Davis, making numerous charges of monopoly in the radio industry. It pointed out that

> "there is no provision in the bill as reported prohibiting or guarding against the issuance or renewal of licenses to parties unlawfully monopolizing or attempting to unlawfully monopolize radio communication, etc., unless and until such party shall have been found guilty thereof by a Federal court"

(*id.*, p. 15), and made specific recommendations (*id.*, p. 22). In the course of these it said:

> "* * * It surely will not be contended that the United States should license applicants to continue to violate its laws."

an idea very similar to that expressed in the Report of the Commission (pp. 82-83, R. 138-139):

> "* * * We cannot believe that Congress intended to leave us powerless to deal with restraints which might fetter the free competitive field it sought to maintain or to require us to promote unlawful conduct by our own affirmative action."

In the course of the debates Congressman Davis said:

> "And yet this Sixty-Seventh Congress bill [H. R. 13773] directly and specifically authorized the Secretary of Commerce upon his own responsibility to refuse a radio license to any person or corporation, who in his opinion was directly or indirectly monopolizing or attempting to monopolize radio communication or any phase of the radio industry. That provision has been radically weakened. It has had the teeth pulled out of it as modified in the bill which you now have under consideration, because it provides that the license shall be refused in case of a monopoly only when a Federal court authorized to act shall have specifically determined hereafter, and upon facts occurring after the passage of the bill, that the applicant is violating those antitrust laws." (67 Cong. Rec., 69th Cong., 1st Sess. (1926), p. 5481.)

Thereafter, Congressman Davis proposed amendments (67 Cong. Rec., 69th Cong., 1st Sess. (1926), pp. 5502, 5561) to provide for the refusal of a station license to anyone found by the *Commission* to have been "unlawfully monopolizing" radio communication or otherwise violating "the laws of the United States against combinations, contracts, or agreements in restraint of trade." These amendments were rejected by the House (*id.*, pp. 5555, 5563).

That the Senate, as well as the House, understood exactly what was proposed in the bill is shown by a colloquy

between Senator Dill and Senator Pittman during the Senate debate. It is as follows (68 Cong. Rec., 69th Cong., 2nd Sess. (1927), p. 3034):

> "Mr. Pittman. I understand; but it is evident that the House did not intend that the commission to be appointed under this bill should have the determination of the question as to whether there was a monopoly existing or whether there were overcharges or whether there were discriminations, and the reasons why they expressly left that out was because there were two bodies, each dealing with those subjects.
>
> "Mr. Dill. The Senator is correct in that."

The Commission says (Rep. pp. 46-47, R. 102-103) that "In the *absence* of Congressional action *exempting* the industry from the antitrust laws, we are not at liberty to condone practices which tend to monopoly and contractual restrictions destructive of freedom of trade and competitive opportunity." This is to construe the standard of "public interest, convenience, or necessity", enacted by Congress to guide the exercise by the Commission of its delegated functions with respect to the subject matter of this particular act, as including a mandate to enforce, by denial of licenses, every general federal statute. There is, for example, no provision in the National Labor Relations Act, the Fair Labor Standards Act, the Securities and Exchange Act, or many other general laws, "exempting" the broadcasting industry from their operation. Does the Commission conceive itself to be authorized by the Communications Act of 1934 to promulgate general regulations that no station shall under any circumstances be granted a renewal of its license if it refuses to bargain collectively with its employees, or

pays them substandard wages, or floats a security issue on a misleading prospectus? And if not, why not? The statutes referred to express the judgment of Congress with respect to *general* public policy as impressively as do the anti-trust laws, and infraction of them could be made to appear as cogent evidence of unfitness for a license as the reasoning whereby the Commission's report here concludes that those who violate the letter or spirit of the anti-trust laws are unfit. The fact that there are other administrative agencies charged with the enforcement of those laws, just as the Department of Justice and the Federal Trade Commission are charged with responsibility for the due execution of the anti-trust laws, would make no difference.

Such a construction of the standard of "public convenience, interest, or necessity" as "a mere general reference to public welfare", without limitation to the particular category of public welfare which was committed to this Commission's administration, is contrary not only to the general rules laid down by this Court for the construction of that phrase (*supra*, pp. 42-43), but to their particular application in the *Sanders Bros.* case.

THIRD: The Commission has no authority under the Act to promulgate a regulation providing for the denial of renewals of licenses to network-operated stations deemed by it to be in an unduly favorable competitive position.

Only the licensing power is involved in the subject of this point, and the only pertinent question under it is as to the asserted authority of the Commission to deny licenses solely for the purpose of promoting competition. No appli-

cation of any supposed principles of licensee responsibility or maximum use of facilities are involved.

Regulation 3.106 is the logical extension to stations owned and operated by network organizations themselves of the Commission's theory that it has not only authority, but duty, to deny a license to any station whose operation in its judgment tends to discourage competition. The standard which it makes the all-controlling one with respect to network-operated stations is whether the existing stations in the locality served are few or unequally desirable in terms of coverage, power, frequency, or other related matters. It should be observed *in limine* that the inequalities in those respects which may exist in any locality may not be assumed to be without justification. Columbia's station in Charlotte, N. C., which the Report (p. 68, R. 124) says is one where no network ownership should be allowed, was acquired by Columbia in 1929, and those in Minneapolis and Washington, D. C., which the report says (*ibid.*) raise serious doubts, were acquired by it in 1931 and 1932, respectively.

The question of the extent to which considerations relating to competition may, consistently with the provisions of the Act, enter into the Commission's determination on licensing applications has been fully discussed in the preceding point, and need not be repeated here.

The chief difference between 3.106 and the other regulations is that 3.106 contemplates a hearing on the case of each particular network-operated station which is an applicant for a renewal, and that in the hearings on the applications of some at least of such stations there will be some factual issues to be tried. But 3.106 none the less requires that the determination depend upon a single fact, namely,

whether the facilities in the locality are so few or so unequal that competition is substantially restricted. The only difference is that, whereas under regulations 3.101 to 3.105, inclusive, denial is automatic once the existence of an affiliation contract containing one of the proscribed provisions appears, under 3.106 the question of whether the relative desirability of the existing stations is actually so unequal that competition would be substantially restrained is open. But that is all that is open. The considerations which Section 308 (b) indicates are the primary qualifications for a license,—character, financial and technical ability and probability of commanding programs that will give satisfaction to the listening audience,—are as irrelevant as they are under the other regulations. In fact, marked superiority of ability to serve the listening public, from the point of view of coverage, power, frequency and related matters, becomes a reason for refusing, rather than granting, a renewal of the license. As to the Charlotte station, at least, the issue is so far predetermined that the Commission is able to announce in its report that no renewal of its license can be expected.

We submit that such a regulation is no more an authorized exercise of the licensing power than are those which predetermine adversely to the affiliated stations their right to renewal of their licenses.

FOURTH: Even if the subject-matter of the regulations were deemed to be generally within the authority of the Commission under the Act, the order promulgating them must nevertheless be set aside because predicated upon an erroneous interpretation by the Commission of the extent of its power and duty with respect to the promotion of a new kind of competition in the broadcasting industry.

Under all of the authorities construing the Act the statutory standard of "public convenience, interest or necessity", which is the "touchstone" for the exercise of the Commission's authority, means the convenience, interest and necessity of the listening public. All other considerations, including those relating to general public interest, must be subordinated to that. The Commission in parts of its Report pays lip-service to that principle. But we submit that the Report as a whole shows clearly that the predominant purpose of the Commission was to fulfill what it regarded as its duty to create new competition in the broadcasting industry.

If the Commission did subordinate considerations affecting the interests of the listening public to this supposed duty, it failed to discharge its delegated functions under the Act, and its order should be set aside, with perhaps a direction to the Commission to reconsider on correct principles.

At the opening of division VII, which immediately follows the factual discussion in its Report, the Commission says (Rep. p. 46, R. 102):

> "'The Communications Act 'recognizes that the field of broadcasting is one of free competition.'

[citing *Federal Communications Commission* v. *Sanders Bros. Radio Station*, 309 U. S. 470, 474, (*supra*, p. 22)] * * *

"It has long been a basic hypothesis of the American system that competition in a free market best protects the public interest. This hypothesis, moreover, has been given the force of law throughout the entire field of interstate commerce. For more than half a century contracts and combinations in restraint of trade, and monopolization or attempted monopolization of interstate commerce, have been outlawed.[3] The fundamental purpose of this legislation is 'to secure equality of opportunity and to protect the public against evils commonly incident to destruction of competition through monopolies and combinations in restraint of trade.'[4] The Sherman Act was enacted 'to preserve the right of freedom to trade'[5] and it is 'based upon the assumption that the public interest is best protected from the evils of monopoly and price control by the maintenance of competition.'[6]

"The prohibitions of the Sherman Act apply to broadcasting.[7] This Commission, although not charged with the duty of enforcing that law, *should administer its regulatory powers* with respect to broadcasting *in the light of the purposes which the Sherman Act was designed to achieve.* * * *"

The above references in footnotes 3, 4, 5 and 6, are to quotations from the Sherman Act, and to decisions of the Supreme Court of the United States construing it, and in footnote 7 to quotations from Section 313 and Section 3 of the Communications Act. The general discussion in this division ends with the sentence (Rep. p. 50, R. 106):

"Pursuant to the mandate of Congress that it grant licenses and renewals only to stations operating in

> the public interest, this Commission must refuse further to license stations which persist in these practices."

The Commission did not predicate its order merely upon a belief that it was entitled to consider the public policy underlying the antitrust laws in discharging its delegated functions under the standard of "public interest, convenience, or necessity". Its Report shows that it believed itself to be under an inescapable statutory *duty* to compel in the broadcast field "the fullest measure of competition possible within physical limitations" (Rep. p. 88, R. 144); that such statutory duty was so imperative that it must be discharged regardless of its effect upon the industry and concomitantly upon the listening public; and so controlling that it overbalanced all other factors comprising the standard.

The Commission stated its thesis as follows (Rep. pp. 46-47, R. 102-103):

> "* * * In the absence of Congressional action exempting the industry from the antitrust laws, *we are not at liberty* to condone practices which tend to monopoly and contractual restrictions destructive of freedom of trade, and competitive opportunity. *Had we liberty in this regard* we *should* require a very clear showing that such pr ices or restraints, because of conditions peculiar t the industry, promote the *best interests of the listening public.* * * *"

The meaning of this is unmistakable. The Commission did not regard itself as at liberty to give consideration to the question whether the contractual provisions which it condemned might on the whole be beneficial rather than detrimental to "the best interests of the listening public", and therefore indicated that it had not made any considerable inquiry into that question.

The above quotation is followed by a sentence which is inconsistent both with what precedes and what follows it in the Report, as well as with the action which the Commission actually took. It reads (Rep. p. 47, R. 103):

> "* * * In any event, preservation of the fullest possible measure of competitive opportunity consistent with furnishing the public adequate broadcasting service is *one of the elements* to be considered in applying the statutory standard of 'public interest, convenience, or necessity.'"

The phrase "the fullest possible measure of competitive opportunity consistent with furnishing the public adequate broadcasting service" is inconsistent both with the two sentences which precede it and with the phrase which we have above quoted from R. 144 that "The Congress * * * has required the fullest measure of competition possible within *physical* limitations". And the statement that preservation of competitive opportunity is "one of the elements" to be considered in applying the statutory standard of "public interest, convenience, or necessity" is inconsistent with the text of the regulations that "No license shall be granted to a standard broadcast station" (no matter how demonstrably that station satisfies all other component elements of the statutory standard) which has a contract with a network organization containing one of the proscribed conditions. That this consideration was intentionally made the sole test is demonstrated by the concluding paragraph of the pages of division VII. which introduce the discussion of the particular contractual provisions (Rep. p. 50, R. 106):

> "A constantly improving service to the public *requires* that all the competitive elements within the industry should be preserved. The door of oppor-

> tunity *must* be kept open for new networks. Competition among networks, among stations, and between stations and networks, all of which profoundly affect station service, *must* be set free from artificial restraints. It is not in the public interest for any licensee station to make arrangements which tend to close that door or restrain that competition. *Pursuant to the mandate of Congress* that it grant licenses and renewals only to stations operating in the public interest, this Commission *must refuse* further to *license stations which persist in these practices.*"

And that this determination to deny licenses to all stations having affiliation contracts with national networks of the sort here involved, regardless of the particular conditions,—even competitive conditions,—in which such stations operate, or the effect of the affiliation provisions upon the interests of the listening public in particular localities of varying character, is shown by contrast with the Commission's treatment of stations having similar or identical contractual relations with regional, as distinguished from national, networks. After saying that "the regional networks are in a state of more rapid flux than the national networks", the Commission said (Rep. p. 77, R. 133):

> "* * * Accordingly, we will carefully consider, in particular instances, any showing that the application of the regulations herein adopted to a station affiliated with a *regional* network will reduce rather than increase its ability to operate in the public interest."

It is not necessary to quote further from the introductory pages of division VII, nor extensively from the matter in the several subdivisions which discuss the particular con-

tractual provisions which the Commission condemns. It is fair to say that the discussion, taken as a whole, shows that the Commission conceived its duty as one to compel a particular type of competition for its own sake. Even in those passages in which the Commission purports to present the alleged advantages of introducing a larger measure of competition into the broadcasting industry, it is quite plain that it refers primarily, if not exclusively, to the general public policy favoring the competitive system which forms the basis of the Sherman Act. Its generally stated conclusions that the several network practices which it condemns do not serve "the public interest" (Rep. pp. 57, 59, 62, 65, 68, 73, 75, R. 113, 115, 118, 121, 124, 129, 131) are either mere assertion, or rest ultimately on the Commission's hypothesis that that must be so because they in some measure restrain competition. The same thesis is the foundation of the Commission's discussion of "Jurisdiction" in division VIII. And in division IX, entitled "Conclusion", the final sentences are (Rep. pp. 88-89, R. 144-145):

> "* * * If the industry cannot go forward on a competitive basis, if the substantial restraints upon competition which we seek to eliminate are indispensable to the industry, then we must frankly concede that broadcasting is not properly a competitive industry. If this be the case, we recommend that the Congress should amend the Communications Act to authorize and direct regulations appropriate to a noncompetitive industry with adequate safeguards to protect listeners, advertisers, and consumers. We believe, however, that competition, given a fair test, will best protect the public interest. That is the American system."

Even if the Court should not accept to the full our argument under Point Second, it is at least clear, we submit, that

the Commission's conception of the size of its power, and duty, under the Act, as evidenced by the above-quoted passages from its Report, is untenable. The same passages, and the Report as a whole, show equally clearly that the Commission would never have ordered the regulations which it did except for that erroneous conception.

The law is established that an order so based may not be permitted to stand. This is true, even though, if the same result had been reached by the Commission by application of valid principles (which, we submit, could not have been the case here), it would have been unassailable under the doctrine of administrative finality.

The case of *Ann Arbor R. Co.* v. *United States*, 281 U. S. 658, is squarely in point. That involved an order of the Interstate Commerce Commission condemning existing rates on deciduous fruits. This Court found (p. 665) that the opinions of the Commission showed "quite plainly that the commission based the order entirely upon" a joint resolution, known as the Hoch-Smith Resolution, which purported to declare "the true policy in rate making" in various respects, among others, that "in view of the existing depression in agriculture, the commission is hereby directed to effect * * * such lawful changes in the rate structure * * * as will promote the freedom of movement by common carriers of the products of agriculture affected by that depression, including livestock, at the lowest possible lawful rates compatible with the maintenance of adequate transportation service." This Court found that the Commission construed the above language as making a change in the basic law of rate-making to place agricultural products in a "most favored" class. Although the Commission made a finding that the existing rates were "unreasonable", this

Court found from the Commission's opinion as a whole that what it meant by that was that the rates were unreasonable under the joint resolution and not under the applicable sections of the Interstate Commerce Act. Holding that the Commission's interpretation of the joint resolution was erroneous, this Court concluded that its order must be set aside.

In *Southern Pacific Co.* v. *Interstate Commerce Commission*, 219 U. S. 433, it appeared that the Interstate Commerce Commission reduced a reasonable rate on the ground that the railroad was estopped to charge a rate in excess of that which had been in force for many years and upon which certain lumber interests had relied. Again the order of the Commission was in form within its powers, but this Court went behind the form and held that the Commission had adopted its order on an erroneous principle and set it aside.

In *Texas & Pacific Ry. Co.* v. *Interstate Commerce Commission*, 162 U. S. 197, the Interstate Commerce Commission made an order requiring import traffic transported to any place in the United States from a port of entry to be taken at the inland tariff governing other freights. In support of its order the Commission stated that it was its duty so to construe the Act as to make it practically correspond with what was assumed to be the policy of the tariff laws. This Court held that the Commission had exceeded its jurisdiction and, with respect to the Commission's reliance upon the policy of the tariff laws to support its decision with respect to discrimination, said (p. 221):

> "Our reading of the act does not disclose any purpose or intention, on the part of Congress, to thereby reinforce the provisions of the tariff laws."

In the recent case of *National Labor Relations Board v. Virginia Electric & Power Co.*, 314 U. S. 469, this Court was unable to ascertain from the report of the National Labor Relations Board whether it had found that a certain bulletin and speeches coerced the company's employees, or had merely taken into consideration the bulletin and speeches together with other circumstances in finding coercion. This Court held that if the Board acted solely on the basis of the coercive effect of the bulletin and speeches, its decision was a violation of the employer's right of free speech guaranteed by the First Amendment. It therefore remanded the case to the Board for a redetermination of the issues in the light of its opinion.

In all these cases, the commission or board possessed express statutory powers to determine the ultimate subject of their orders. Nevertheless, when it appeared that the commission or board had exercised its power by the application of erroneous principles, the orders were set aside.

FIFTH: If the Communications Act were construed to authorize the Commission to make the order here in question, it would be unconstitutional.

a. Invalid Delegation of Legislative Power.

The Commission's effort to accommodate an order having the purpose and effect of that here in question to the scope of the authority committed to it by the Communications Act leads it into a dilemma. If the Act is construed to limit the elements which the Commission is entitled to consider under the standard of "public convenience, interest, or necessity" to those which are expressly stated or reasonably to be in-

ferred from the context in the Act, then the Commission is not vested with authority extensive enough to support the order which it has made. If, however, the phrase "public convenience, interest, or necessity" is given so latitudinarian a construction that power of the breadth here invoked by the Commission is to be deemed comprehended within it, then the standard for administrative action would be so vague and indefinite as to violate constitutional limitations.

The general principle that Congress is not permitted to transfer to administrative agencies the essential legislative functions with which it is vested by Article I, Section 1, of the Federal Constitution, and that such an invalid delegation exists where Congress fails to express a sufficient definition of standards to govern the administrative action of the agency, is established beyond question. *Panama Refining Co.* v. *Ryan*, 293 U. S. 388; *A. L. A. Schechter Poultry Corp.* v. *United States*, 295 U. S. 495.

The validity of the Radio Act of 1927 was upheld *because* the criterion of public convenience, interest or necessity was not taken as "a mere general reference to *public welfare* without any standard to guide determinations" (see *New York Central Securities Corp.* v. *United States*, 287 U. S. 12, 24), or "as setting up a standard so indefinite as to confer an unlimited power" (*Federal Radio Commission* v. *Nelson Brothers Bond & Mortgage Co.*, 289 U. S. 266, 285). See *supra*, p. 42; see also the passages in the opinions in the *Panama* case, 293 U. S., p. 428, and the *Schechter* case, 295 U. S., p. 540, distinguishing the Radio Act.

But, if the construction of the standard now attempted by the Commission were upheld, there would be no discernible limit to the sweep of its authority.

There is nothing in the case of *United States* v. *Rock Royal Co-operative, Inc.*, 307 U. S. 533, which justifies the appellees' contentions. The standards referred to by this Court (pp. 574-577) are far more precisely stated than the standard which the Commission's attempted interpretation of the Communications Act would imply. The sections of the Agricultural Marketing Agreement Act of 1937, in which they were contained, are quoted in the margin of pages 542-545 of the opinion. The standard which the Commission would administer under the Communications Act, if the interpretation asserted by it were accepted, would much more closely resemble the declaration of policy which was held insufficient in the *Schechter* case, and which this Court in the *Rock Royal Co-operative* case quoted in the margin of page 575. The Court said (307 U. S., pp. 575-576):

> "* * * In the Recovery Act the Declaration of Policy was couched in most general terms. In this Act it is to restore parity prices, § 2. Under the Recovery Act, general welfare might be sought through codes of any industry, formulated to express standards of fair competition for the businesses covered. Here the terms of orders are limited to the specific provisions, minutely set out in § 8c (5) and (7). While considerable flexibility is provided by § 8c (7)(D), it gives opportunity only to include provisions auxiliary to those definitely specified."

In fact, the power which the Secretary of Agriculture was to exercise under the Agricultural Marketing Agreement Act of 1937, involved in the *Rock Royal Co-operative* case, was far more akin to the kind of power exercised by the Interstate Commerce Commission in fixing reasonable rates, and in establishing divisions of joint rates under the Trans-

portation Act of 1920, than it is to application of the standard of "public convenience, interest, or necessity" under the Communications Act. *United States* v. *Illinois Central R. Co.*, 291 U. S. 457, 462, is also of that nature.

In the recent case of *Opp Cotton Mills* v. *Administrator*, 312 U. S. 126, this Court in reviewing the constitutionality of the Fair Labor Standards Act of 1938 described the essentials of the legislative function as follows (p. 145):

> "* * * The essentials of the legislative function are the determination of the legislative policy and its formulation as a rule of conduct. Those essentials are preserved when Congress specifies the basic conclusions of fact upon ascertainment of which, from relevant data by a designated administrative agency, it ordains that its statutory command is to be effective."

We are here dealing with regulations prescribing the terms upon which a station may contract for network service. Congress has not established any legislative policy with respect to those terms. The rules which the Commission has applied in this case are not set forth in any provision of the statute. They have been manufactured by the Commission without any guide from Congress. The Commission says (Rep. p. 46, R. 102): "The prohibitions of the Sherman Act apply to broadcasting", but it does not apply the standards of the Sherman Act and determine whether the contracts are in unreasonable restraint of trade. It invents a new standard of competition which disregards the element of reasonableness, and which may include within the proscribed class of contractual provisions even those which do not offend the Sherman Act. The Commission says (Rep. p. 66, R. 122): "The licensee him-

self must discharge the responsibilities imposed by the law." But nowhere in the law can any standard be found for judging the terms of network contracts in the light of licensee responsibility. The Commission invents the principle of maximum use of facilities and then determines on its mere say-so that terms of network contracts violate this standard. It is apparent that, on the Commission's interpretation of the Act, Congress has not specified the basic conclusions of fact upon ascertainment of which, from relevant data, a statutory command with respect to the terms of network contracts is to be effective.

If "public convenience, interest, or necessity" be so construed as to authorize the Commission to prescribe the terms of network contracts, the statute is unconstitutional in that it does not prescribe any rule by which the terms of these contracts are to be judged.

b. The First Amendment.

We submit that if the Act were construed to authorize the Commission to promulgate the regulations here in question, it would be unconstitutional as an abridgement of the freedom of speech and of the press in violation of the First Amendment to the Constitution.

There can be no question that communication by radio broadcasting is within the scope of the guaranties of freedom of speech and of the press. Every broadcasting station is an important instrument of dissemination of news, ideas, and discussion. Radio broadcasts are more largely relied on by the people as a source of news even than the newspapers (*supra*, p. 14). "The press in its historic connotation comprehends every sort of publication which affords a

vehicle for information and opinion". *Lovell* v. *Griffin*, 303 U. S. 444, 452.

Even if the regulations here involved had stood in the form in which they were first proposed (*supra*, p. 39) they would have violated the constitutional guaranty. The court below recognized (R. 490) that "it is not necessary for a law directly to control the substance of an utterance for it to invade the right of free speech"; and that regulations forbidding stations to make contracts with networks, even though they believe that this will bring them better programs than they can get in any other way, are such an interference since they "fetter the choice of the station".

But the form in which the regulations were finally promulgated involves an additional vice, arising from the nature of the penalty which they impose upon a station which refuses to accede to the Commission's attempted curtailment of their freedom to make such contracts as they deem advisable to insure a supply of material for publication and a wide circulation therefor. That penalty is that the station be put off the air. The Commission's order is thus an undisguised attempt to enforce submission to a governmental edict by threat of suppression of publication.

In addition to the stations, Columbia itself as a network organization is, we submit, an important vehicle of free speech which is entitled to the protection of the First Amendment. Many of the outstanding programs, especially those of news, news analysis, discussion of public questions and special events of public importance in many parts of the world, are of network, rather than station, origin. Columbia is thus as much a publication as a newspaper or national magazine. Its owned and affiliated stations are its outlets for the dissemination of news, information and ideas.

Except for the physical fact that the number of frequencies is limited, there would have been neither occasion nor excuse for denying to anyone this new vehicle of communication. A law providing that no newspaper could be published except under license would be void on its face. From the point of view of freedom of speech, the grant of a broadcasting license is not to be regarded as the conferring by Government of a privilege, in any such sense as to validate subjecting it to conditions of all kinds. It is rather the recognition of a right, subject only to the qualification that an equal right cannot be conferred on everyone. But for that fact, there would be no reason why the broadcasting business should not be as open to all comers as the newspaper business, why there should be any greater restriction on communication by radio than by pamphlets and handbills, or hiring a hall or mounting a soapbox in a public park; an attempt by Congress to impose any restriction would involve constitutional questions of the gravest character.

It follows that this fundamental, constitutional limitation must greatly confine, even if the terms of the Act did not confine, the conditions which the Commission could validly place upon the grant of a license, or the renewal of one. They must, we submit, have some demonstrable, and not merely remote, relation to the problem which alone furnishes the justification, namely, that if everyone who wished to broadcast by radio were permitted to do so, the resulting "confusion and interference" would be such that the listening public would be able to hear no one.

Apart from this we submit that it is essential that any statute purporting to restrict the exercise of the rights of free speech and of free press specify with particularity the conditions of the restriction. Granted that these rights

"are not absolutes to be exercised independently of other cherished privileges, protected by the same organic instrument" (*Jones* v. *Opelika*, 316 U. S. 584, 593), the necessity for particular definition of the proposed restriction arises, if from nothing else, because without it the courts have no basis for resolving the "conflicts in the exercise of rights" (*ibid*) as between the interest of preserving freedom of speech and of the press on the one hand, and the asserted over-balancing interest on the other. It is the unpredictability of the exercise of power by a licensor which makes an unlimited licensing system intolerable in the area of free speech and a free press (see *Lovell* v. *Griffin*, *supra*, 303 U. S., p. 451). Even where circumstances compel or justify the exaction of a license upon vehicles of expression, the licensee must never hold his license at the whim of Government.

Applying these unquestioned principles to the instant case, a construction of the Communications Act limiting the conditions upon which broadcasting licenses may be denied or revoked to those announced by this Court in the *Sanders Bros.* case (*supra*, pp. 22-23) raises no issue of free speech. But a construction of the Act which would confer upon the Commission as undefined a power to deny or revoke as that which alone could support the regulations here in question would be obnoxious. If the Commission can today make the existence of provisions which it deems objectionable in an affiliation contract a sole controlling ground for denial of licenses to hundreds of affiliated stations, it may tomorrow make some other entirely different fact such a single controlling ground. Such unpredictability of action on the part of a Commission endowed with a life or death power over licensed stations could only result in the licensees living in such a constant state of fear that they would not dare

oppose the merest intimation from the Commission of its desires on any subject. Regulation by the nod or frown of a licensor was the essence of the very evil against which the First Amendment was adopted as the safeguard.

The above argument involves no question as to the extent to which broadcasters, like other instrumentalities of free expression, are subject to general laws. This Court held in *Associated Press* v. *National Labor Relations Board*, 301 U. S. 103, that the Associated Press was subject to proceedings under the National Labor Relations Act for discharging an editorial employee on the sole ground of his union activity and agitation for collective bargaining. But nothing in the opinion suggests, and we are confident that this Court would not hold, that a law making such an offense a sufficient cause for prohibiting the continued publication of the newspaper could possibly be sustained. The distinction between punishment for unlawful acts and restraints upon publication is fundamental (*Near* v. *Minnesota*, 283 U. S. 697, 713-715; *Lovell* v. *Griffin*, 303 U. S. 444; *Schneider* v. *State* (*Town of Irvington*), 308 U. S. 147; *Hague* v. *Committee for Industrial Organization*, 307 U. S. 496). An essential ground of the opinion of the majority of this Court in *Jones* v. *Opelika*, *supra*, was that no contention was made by the petitioners that the effect of the tax there in question was so large as to operate as a substantial deterrent to the distribution of their literature (316 U. S., pp. 592-593; *cf. Grosjean* v. *American Press Co., Inc.*, 297 U. S. 233).

The court below, as we have said, agreed that the regulations amounted to an impairment of freedom of speech. The sole reason which it gave for its conclusion that no problem under the First Amendment is presented, was that "the interests which the regulations seek to protect are the

very interests which the First Amendment itself protects, i.e. the interests, first, of the 'listeners,' next, of any licensees who may prefer to be freer of the 'networks' than they are, and last, of any future competing 'networks' ".

We submit that an actual abridgement of freedom of speech can never be justified on the sole ground that the perpetrator thereof believes that the ultimate result of the suppression will be to permit freedom of expression by a larger number of persons. Such a conclusion would open too easy avenues for evasion of the constitutional guaranty. But, if such belief ever can be a justification, at least something akin to a demonstration of its validity should be required. Here whether such would be their effect is wholly speculative. It is our contention that the effect would be the exact opposite, since abrogation of network practices, which experience has shown to be the only practicable method for obtaining commitments from advertisers, which in turn are the sole support not only of the commercial but of the sustaining programs as well, would so strike at the economic foundation of the broadcasting industry as to impair gravely its ability to continue as an effective agency of publication. The Commission Report expresses an opinion to the contrary. But, as the court below said in another connection (R. 491), its findings "are necessarily prospective: time alone can decide their success or their failure"; and even the opinions of those who are steeped in the details of the business "must be largely speculation".

We submit that the profession of such opinions, necessarily incapable of demonstration, cannot excuse infringements of freedom of speech which are present, tangible and drastic.

SIXTH: The regulations are arbitrary and capricious.

For purposes of the argument in this point we assume that the Act gives to the Commission authority with respect to the matters with which the regulations deal. Nonetheless, we submit, the regulations are arbitrary and capricious because not a reasonable exercise of the Commission's power to grant or deny licenses in accordance with the statutory standard of "public convenience, interest or necessity".

There is no rational basis for making a single fact, like the presence in an affiliation contract of an objectionable provision, the sole determining factor in all applications. The court below misapprehends the grounds upon which inflexible and undiscriminating regulations upon such a subject may be challenged. It says (R. 488) that acceptance of our position "would go far to destroy the power to make any regulations at all". Clearly it does no such thing. Everything depends upon the subject-matter of the regulations in question. There are many subjects on which general regulations are an entirely reasonable exercise of the Commission's power. Technical and engineering standards, for example, may of course properly be made applicable to all stations in the same general category. But as to licensing, it is the duty of the Commission to weigh and balance in relation to each other all of the many elements which for purposes of this argument we assume may be comprehended within the standard of "public convenience, interest, or necessity" as they bear upon the best service to the listening public. The inherent nature of that duty is such that it can be reasonably discharged only in the light of the situation of each individual station

and the audience which it serves. The court below said (*ibid*) that it could not "see the advantage of preventing a general declaration of standards which, applied in one instance, would in any event become a precedent for the future". But a rational application of the statutory standard would preclude making the Commission's action on one station a precedent for its action on another, except to the extent that the considerations which impelled a certain action in the case of the one were duplicated in that of the other, and were not counterbalanced by those wherein the two differed.

The Commission pays tribute (Rep. p. 4, R. 60) to the benefits that the existing system of network broadcasting has brought to the industry and concomitantly to the listening public throughout the nation. It professes (Rep. pp. 88-89, R. 144-145) solicitude that this structure should not unnecessarily be impaired and expresses the opinion that the regulations would not have that result. But its Report discloses no realistic consideration of the facts (*supra*, pp. 13-18) upon which appellant predicates its belief that the natural consequence of enforcement of the regulations will be disintegration. And, as we have pointed out in Point Fourth (*supra*, pp. 71-77) the reason why such consideration was not given is that the Commission regarded its supposed duty to create new forms of competition as the more compelling one.

Even upon such an assumption, however, a Commission exercising reasonably its licensing functions would have weighed at least the competitive conditions surrounding the cases of individual applicants.

The principal benefits which the Commission asserted would follow from the elimination of the provisions of the affiliation contract which it found ojectionable were three:

1. That the stations would be freer to serve the needs of their local communities by broadcasting more local programs (*e.g.*, Rep. 65, R. 121);

2. That conditions favorable to the development of additional national networks would be fostered (*e.g.*, Rep. p. 50, R. 106);

3. That the Mutual Broadcasting System would be aided in its competition with Columbia and NBC (*e.g.*, Rep. p. 51-52, R. 107-108).

The regulation which is supposed to foster local programs is 3.104. The form in which the regulation was originally promulgated in May, 1941 (Rep. p. 92, R. 148) might have justified the enthusiastic phrases in which the Commission, in the passage of its Report above cited, emphasized the importance of local program service. It outlawed "option time" altogether. But Mutual petitioned for rehearing on that regulation and, as a result thereof, the Commission eliminated most of the features which would have helped local programs while retaining its full drastic effect in aid of competing networks. All that the final form of the regulation does for local programs is to increase the required notice from 28 to 56 days and to require that the period subject to the option must be measured in clock hours. But during the hours, chosen by the network organization in the four segments of the broadcast day,—which will naturally be the most desirable ones,—local programs may still be displaced to make way for net-

work ones. It is only as against other networks that the option permitted by the regulation is made non-effective. Apparently, therefore, even 3.104 was promulgated more in the interests of Mutual than to require a greater amount of station time being devoted to local programs.

The second professed purpose, of benefitting the listening public through leaving the door open for the emergence of new national networks, is, we submit, illusory.

Chairman Fly at the oral argument on December 3, 1940, after all the evidence had been taken, and the committee appointed by the Commission to examine it had filed its preliminary report, stated (Transcript of Proceedings before the Commission, Ex. A to Defendant's Motion to Dismiss (not included in the printed record but covered by the stipulation at R. 506), pp. 8897-8898):

> "It is dubious as to whether or not, assuming present availability of frequencies, it is dubious whether or not there can be four nation-wide networks. And apparently it would be extremely difficult to have any more."

There are now four national networks. In view of the chairman's opinion, exploration of the question whether even one additional network is economically feasible or otherwise desirable in the public interest, convenience and necessity, and findings based on evidence thereon, should be required before regulations interfering with important existing contractual relationships are promulgated for the purpose of promoting such an objective. But the administrative record discloses none such.

Moreover, it requires no expert experience to perceive that the tendency of Regulations 3.101, 3.102 and 3.104 would not be to encourage the creation of true national networks. What it would encourage would be a prevalence of temporary national "hook-ups".

The distinction between a true network and a mere "hookup", by whatever name called, is thoroughly recognized in the evidence before the Commission. The Digest and Analysis of Evidence prepared by the staff of the Commission stated (pp. 18-19):

> "The principal characteristic which distinguishes a network from a group-selling arrangement, (temporary network (or chain)), is that a network provides to its outlets a reasonable assurance of continuous program service; when commercial programs (defined later in this chapter) are not being transmitted to network outlet stations, such stations usually may draw sustaining programs (defined later in this chapter) from the network program headquarters. The group-selling arrangements, or temporary networks, on the other hand, usually provide only the particular commercial program for which the group was unified; in some singular instances the unification is for the purpose of broadcasting a sustaining program, such as an agricultural information service. These stations always revert to their individual status at the conclusion of each such broadcast."

One of the uncontroverted facts in this proceeding, which appears throughout the Commission's report, is that in every city there are wide disparities in the relative desirability to advertisers of the various broadcasting sta-

tions there located.* The relative attractiveness of individual stations depends largely upon their power, and the frequencies and hours of operation assigned to them. Each of the national networks includes strong stations, weak stations and indifferent stations. In one city the station of one network is the predominant one; in another city that of another network. Other examples of competitively weak stations are those located in sparsely settled areas having slight market appeal, especially if the areas which they serve can also be reached by strong stations in the nearest large cities.

Obviously, if a national advertiser had unlimited choice of stations for a hook-up of say fifty cities he would choose in each of the fifty cities the station having the widest coverage by reason of power, etc. That is what the Commission's regulations here in question would promote. The effect of 3.101 and 3.104 would be to destroy the network's hold, under paragraph 8 and the "option time" provisions of paragraph 2 of the affiliation contract (*supra*, p. 8),

*This is graphically shown in the December, 1941 issue of a publication called "Radio Advertising, Rates and Data", published by Standard Rate and Data Service (not included in printed record but covered by the stipulation at R. 506), which is universally relied on by advertisers and the broadcasting industry (Stanton affid. of Dec. 12, 1941, R. 467). The network data, both national networks and regional networks, appear beginning at page 11 of this publication. Beginning at page 23, and continuing through the balance of the publication, are descriptions of all of the individual stations arranged by states and cities. Taking two examples: In Atlanta, Georgia (p. 75) NBC's Red Network affiliate, WSB, is the only 50,000 watt station in town. On the other hand in Detroit (p. 140) Columbia's affiliate WJR, is the only 50,000 watt station. Examples either way could be multiplied from the data as to different cities.

on the strong stations in its chain; and the effect of 3.102 would be to destroy the hold on the network which the weak stations on the chain have under the reciprocal provision of paragraph 8 of the contract. The inevitable consequence would be that the most lucrative programs would gravitate to the most powerful stations, regardless of their network affiliations, and that the weaker affiliated stations on every network would be relegated to second or third class commercial programs (Paley affid., R. 242). The present incentive to the strong stations to promote good will through broadcasting high-quality sustaining programs would be greatly diminished, and the temptation to run them on a purely money-making basis would be powerful. The inevitable consequence would be to destroy true network service which includes the production of distinguished sustaining programs and other non-remunerative operations, and the building up of the good will of the weaker stations on its chain along with that of the stronger ones.

Even with respect to the third purpose, to aid Mutual in its competition with Columbia and NBC, there is no rational basis for such inflexible and undiscriminating regulations as those here in question.

Certainly Mutual does not need assistance in those cities, of which there are many, where there are now four or more stations, one of which is affiliated with Mutual, provided at least that the coverage of Mutual's station is adequate. Even as to cities where there are less than four stations, and where Mutual has not an affiliate, the statistics presented in the Report (p. 51, R. 107) and in Mutual's affidavits (R. 425-435) are misleading.

It is not necessary that a national network have a station even in every considerable city in the country. If it were, Columbia's network, the NBC's Red and the Blue Network would each comprise two or three hundred affiliates instead of between 100 and 125. There are many considerable cities in which Columbia has no affiliate outlet and the same is true of the other two.

It is common knowledge that a strong station in a favorably located city reaches territories far distant from its transmitter, and that these territories, except in sparsely settled parts of the country, include several other cities. It is also common knowledge that the question of the size of the area which a station can effectively cover is an individual one depending upon many considerations, including, besides power, topography, soil conditions, frequency, location of the transmitter, etc. The Commission states (Rep. p. 52, R. 108) that "in the many areas where all stations are under exclusive contract to NBC or CBS the public is *deprived of the opportunity to hear* Mutual programs". If this was the actual ground of the regulations, it was vital to have findings as to the precise cities and areas in which this condition obtains. There are no such findings. Obviously it is not a reasonable exercise of the licensing power to apply drastic rules in localities where there is no necessity for them.

We submit that the attempt of the Commission to deal, inflexibly and indiscriminately, with all affiliated stations in all localities and all conceivable sets of circumstances, is arbitrary and capricious and has no reasonable relation to the standard of public convenience, interest and necessity established by the Act, however that standard is construed.

SEVENTH: It was error to dismiss the complaint on the merits as a matter of law without requiring the defendants to file an answer or a trial of any issues thereby raised.

Of the three grounds upon which the defendants made their motion to dismiss the complaint or, in the alternative, for summary judgment (R. 469), the only one which survived this Court's decision on the former appeal was the third, that the affidavit upon which the motion was made (R. 469-474) and Exhibit A (being the administrative record of proceedings before the Commission) filed therewith, showed "that there is no genuine issue as to any material fact and that the defendants are entitled to a judgment as a matter of law".

We submit that the defendants are in no event entitled to judgment on the merits as a matter of law. Columbia may well be substantially so entitled. If it were held that the regulations are beyond the statutory authority of the Commission, that would be an end of the case, except for findings satisfying the conventional grounds of equity jurisdiction, which the court below has in substance already found in its action providing for a stay (R. 494-495). Columbia would be entitled to a preliminary injunction, and to a final injunction unless appellees were able successfully to controvert its allegations regarding equity jurisdiction. The same situation would obtain if it were held that, if the Act were construed to confer upon the Commission authority to make these regulations, it would be unconstitutional; or that the Commission, though having statutory authority over the general subject-matter, proceeded upon an erroneous interpretation of the extent of its authority and duty to create competition. But, as to appellees, even

if it were held that the Commission had statutory authority to adopt regulations on the subjects here involved, that it did not misconceive the extent of its authority with respect to enforcing competition, and that the Act as construed to confer such authority is constitutional, the question would still remain whether the regulations were an arbitrary and capricious exercise of that power, and so must be set aside.

As to that issue, we submit that Columbia was entitled to an answer and a trial, and that on such trial the evidence should not be limited to the administrative record.

The proceedings which eventuated in the orders now under review are quite dissimilar from orders making quasi-judicial determinations of defined questions committed by Congress to the judgment of an administrative agency. It is to such determinations that the decisions of this Court (*e.g., Tagg Brothers & Morehead* v. *United States*, 280 U. S. 420) holding that a court will not reweigh the evidence taken before the administrative body or receive additional evidence relating to the propriety of the administrative action, have related. In such cases the issues on judicial review are whether the findings made by the administrative body are adequate to support its decision and whether there was substantial evidence in the administrative record to sustain the findings.

The statutes under which determinations of that character are made require a full hearing before the administrative agency, upon the evidence adduced in which the agency may predicate specific findings of fact. But the Commission in the instant proceeding was acting in a legislative capacity and, as to action of the sort here involved, the Communications Act did not contain any requirement that it hold hearings, or make findings. Substantially speaking, we submit, it made no findings, for its discursive report is

not a substitute for specific determinations of defined issues of fact. The Commission did hold extensive hearings, though not obliged by the statute to do so, but those hearings were similar to those held by committees of Congress to inform itself with respect to the subject-matter of proposed or possible legislation.

At the opening of the hearings, the Chairman stated (Transcript, Ex. A (pp. 13-14)):

> "The purpose and object of this investigation is to develop facts for the information of the Commission and public concerning the matters included in Order No. 37. On the basis of the facts developed in the course of the investigation, appropriate rules and regulations dealing with such matters will be promulgated by the Commission, and if such facts demonstrate the necessity therefor, legislative recommendations made to the Congress by the Commission."

There was no well defined administrative issue upon which testimony could be presented. The notice containing suggested forms of regulations was not given until a year and a half after the testimony was concluded (Complaint, Par. Eighth, R. 7-8, and Ex. F thereto, R. 43). The Commission called upon the networks to present evidence with respect to twenty items (Tr., pp. 9-12; Ex. E to Complaint, R. 38, 40-42). Many of these were irrelevant to the particular regulations which were subsequently adopted. It stated at the outset that cross-examination of witnesses generally would be by the committee and by its staff; that parties desiring to ask questions should, if at all possible, hand such questions to the Commission's counsel in writing and that departure from this procedure would be allowed only where

the committee should decide that the ends of justice will be served thereby (*id.*, p. 13).

The hearings were never formally closed. At the conclusion of the taking of testimony on May 19, 1939, the committee adjourned subject to the call of the committee (Tr., p. 8713).

At the opening of the oral argument on December 2, 1940, the Chairman of the Commission stated (Tr., p. 8716):

> "In Docket No. 5060, in the matter of the Investigation of Chain Broadcasting, the Commission has invited an oral argument which is to be limited to the issues of fact *and policy* raised by the report of the Chain Broadcasting Committee dated June 12, 1940. The Commission has also issued certain questions as to possible regulations to which attention has been particularly invited."

Mr. Taylor, General Counsel for the Commission stated (Tr., pp. 8719, 8720):

> "From the very outset it was recognized, and it was so stated by Chairman McNinch, at the opening of the hearings, that the facts elicited might lead to regulations which the Commission presently has power to promulgate and that also the facts might show the necessity for recommendations to Congress with respect to matters outside the Commission's jurisdiction under existing law."

The Chairman of the Commission, at the hearing on December 3, 1940, expressed the desire to have the parties give attention to the areas of competition and how best the public might get the most out of the industry in terms of healthy competition (Tr., p. 8897), and stated that he did

not think that the Commission ought to be strictly limited to the record (*id.*, p. 8899).

The foregoing sufficiently demonstrates that the hearings which were held were in the nature of exploratory excursions into the field of broadcasting to develop facts upon which the Commission might exercise its regulatory powers or make recommendations to Congress in the event that it concluded that its regulatory powers were insufficient to accomplish what it deemed to be desirable objectives.

There is no similarity whatever between the minutes of such an investigation and an administrative record containing the evidence upon which the Commission makes a quasi-judicial determination.

Moreover, the Commission's Report relies upon facts which were not introduced in evidence at the hearings. These facts are not confined to matters of common knowledge or public record. Thus, for example, the alleged instance of the adverse effect of territorial exclusivity given by Station WBNY at Buffalo in its relation with Mutual (Rep. pp. 58-59, R. 114-115) was contained in a brief filed August 7, 1940 by this station. Again, the changes in Mutual's set-up referred to in the Report (p. 28, R. 84) were not in evidence.

The supplemental opinion on rehearing of October 11, 1941 (Ex. C to Complaint, R. 20-22) refers to the hearings before the Senate Committee on Interstate Commerce held in June, 1941, and conferences during July and August, following the hearings, between the Commission and representatives of Columbia, NBC and Mutual, and states that the Commission had decided to amend three of the chain broadcasting regulations after a careful study, among other things, of the testimony presented before the

Senate Committee, and of the considerations presented at the conferences which followed the hearings.

The fact that the Commission considered matters outside the record shows that it regarded itself as engaging in a legislative inquiry rather than as making a determination upon a record which would conclude interested parties. It is well settled that quasi-judicial determinations may not validly be made except upon evidence introduced at the hearings. *Interstate Commerce Commission v. Louisville & Nashville Railroad Co.*, 227 U. S. 88, 93.

No case suggests that a record so compiled for such a purpose precludes a court from taking testimony as to whether the regulations have any reasonable relation to the statutory authority of the Commission. It was entirely proper for the Commission to take testimony before issuing regulations, but there is nothing in the Communications Act indicating that the review of regulations by the Court must be solely upon the record of such an investigation as was made by the Commission.

The opinion of the court below ignores completely the fundamental difference between administrative proceedings of the sort here involved and those in which it has been held that judicial review is limited to the administrative record. It reverts to the theory, which underlay its decision of the jurisdictional question which this Court reversed, that, because the "determining issues" which the Commission considered in this proceeding were, as it thought, the same as those which would be involved in the application of an affiliated station for renewal of its license, the rules regarding judicial review thereof should also be the same.

Thus it says that, upon an appeal to the Court of Appeals of the District of Columbia under Section 402(b) from the Commission's denial of a renewal of a license, the only issues open would be whether there was substantial support for the findings in the administrative record, and whether the findings were arbitrary or capricious, citing Section 402(e). But the proceedings upon an application for renewal of a license are quasi-judicial in character; they present defined questions of fact as to the application to that particular station of the standard of "public convenience, interest, or necessity"; the Commission, unless it reaches a favorable determination of that question on the face of the application itself, must, under Section 309(a) fix and give notice of time and place for hearing and afford the applicant an opportunity to be heard; and after holding such hearing must make specific findings (*supra*, p. 50, footnote). There are no such requirements for a general investigation by the Commission of the state of the industry designed to guide the taking by it of legislative action by general regulations. And this fact, we submit, necessitates a different scope of judicial review.

CONCLUSION

The decision of the court below should be reversed; and the cause remanded with directions to enter a preliminary injunction, and a final injunction if the requirements of equity jurisdiction are sustained, or, even if this Court should not reach such a conclusion, with directions that appellees be required to answer and that a trial be held on the issues raised thereby.

Respectfully submitted,

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January 19, 1943.

APPENDIX

Sections of Communications Act of 1934:

§ 301. License for radio communication or transmission of energy.

It is the purpose of this chapter, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions; and periods of the license. No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio (a) from one place in any Territory or possession of the United States or in the District of Columbia to another place in the same Territory, possession, or District; or (b) from any State, Territory, or possession of the United States, or from the District of Columbia to any other State, Territory, or possession of the United States; or (c) from any place in any State, Territory, or possession of the United States, or in the District of Columbia, to any place in any foreign country or to any vessel; or (d) within any State when the effects of such use extend beyond the borders of said State, or when interference is caused by such use or operation with the transmission of such energy, communications, or signals from within said State to any place beyond its borders, or from any place beyond its borders to any place within said State, or with the transmission or reception of such energy, communications, or signals from and/or to places beyond the borders of said State; or (e) upon any vessel or aircraft of the United States; or (f) upon any other mobile stations within the jurisdiction of the United States, except under and in accordance with this chapter and with a license in that behalf granted under the provisions of this chapter (47 U. S. C., § 301).

§303. Powers and duties of Commission.

Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall—

(a) Classify radio stations;

(b) Prescribe the nature of the service to be rendered by each class of licensed stations and each station within any class;

(c) Assign bands of frequencies to the various classes of stations, and assign frequencies for each individual station and determine the power which each station shall use and the time during which it may operate;

(d) Determine the location of classes of stations or individual stations;

(e) Regulate the kind of apparatus to be used with respect to its external effects and the purity and sharpness of the emissions from each station and from the apparatus therein;

(f) Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this chapter: *Provided, however,* That changes in the frequencies, authorized power, or in the times of operation of any station, shall not be made without the consent of the station licensee unless, after a public hearing, the Commission shall determine that such changes will promote public convenience or interest or will serve public necessity, or the provisions of this chapter will be more fully complied with;

(g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest;

(h) Have authority to establish areas or zones to be served by any station;

(i) Have authority to make special regulations applicable to radio stations engaged in chain broadcasting;

(j) Have authority to make general rules and regulations requiring stations to keep such records of programs, transmissions of energy, communications, or signals as it may deem desirable;

(k) Have authority to exclude from the requirements of any regulations in whole or in part any radio station upon railroad rolling stock, or to modify such regulations in its discretion;

(l) Have authority to prescribe the qualifications of station operators, to classify them according to the duties to be performed, to fix the forms of such licenses, and to issue them to such citizens of the United States as the Commission finds qualified;

(m) (1) Have authority to suspend the license of any operator upon proof sufficient to satisfy the Commission that the licensee—

(A) has violated any provision of any Act, treaty, or convention binding on the United States, which the Commission is authorized to administer, or any regulation made by the Commission under any such Act, treaty, or convention; or

(B) has failed to carry out a lawful order of the master or person lawfully in charge of the ship or aircraft on which he is employed; or

(C) has willfully damaged or permitted radio apparatus or installations to be damaged; or

(D) has transmtited superfluous radio communications or signals or communications containing profane or obscene words, language, or meaning, or has knowingly transmitted—

(1) false or deceptive signals or communications; or

(2) a call signal or letter which has not been assigned by proper authority to the station he is operating; or

(E) has willfully or maliciously interfered with any other radio communications or signals; or

(F) has obtained or attempted to obtain, or has assisted another to obtain or attempt to obtain, an opreator's license by fraudulent means.

(2) No order of suspension of any operator's license shall take effect until fifteen days' notice in writing thereof, stating the cause for the proposed suspension, has been given to the operator licensee who may make written application to the Commission at any time within said fifteen days for a hearing upon such order. The notice to the operator licensee shall not be effective until actually received by him, and from that time he shall have fifteen days in which to mail the said application. In the event that physical conditions prevent mailing of the application at the expiration of the fifteen-day period, the application shall then be mailed as soon as possible thereafter, accompanied by a satisfactory explanation of the delay. Upon receipt by the Commission of such application for hearing, said order of suspension shall be held in abeyance until the conclusion of the hearing which shall be conducted under such rules as the Commission may prescribe. Upon the conclusion of said hearing the Commission may affirm, modify, or revoke said order of suspension.

(n) Have authority to inspect all radio installations associated with stations required to be licensed by any Act or which are subject to the provisions of any Act, treaty, or convention binding on the United States, to ascertain whether in construction, installation, and operation they conform to the requirements of the rules and regulations of the Commission, the provisions of any Act, the terms of any treaty or convention binding on the United States, and the conditions of the license or other instrument of authorization under which they are constructed, installed, or operated.

(o) Have authority to designate call letters of all stations;

(p) Have authority to cause to be published such call letters and such other announcements and data as in the

judgment of the Commission may be required for the efficient operation of radio stations subject to the jurisdiction of the United States and for the proper enforcement of this chapter;

(q) Have authority to require the painting and/or illumination of radio towers if and when in its judgment such towers constitute, or there is a reasonable possibility that they may constitute, a menace to air navigation.

(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party (47 U. S. C., § 303).

§ 304. Waiver by license of claims to particular frequency or of ether.

No station license shall be granted by the Commission until the applicant therefor shall have signed a waiver of any claim to the use of any particular frequency or of the ether as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise (47 U. S. C., § 304).

§ 307. Licenses; allocation of facilities; terms.

(a) The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this chapter, shall grant to any applicant therefor a station license provided for by this chapter.

(b) In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities

as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

* * * * * * * * *

(d) No license granted for the operation of a broadcasting station shall be for a longer term than three years and no license so granted for any other class of station shall be for a longer term than five years, and any license granted may be revoked as hereinafter provided. Upon the expiration of any license, upon application therefor, a renewal of such license may be granted from time to time for a term of not to exceed three years in the case of broadcasting licenses and not to exceed five years in the case of other licenses, but action of the Commission with reference to the granting of such application for the renewal of a license shall be limited to and governed by the same considerations and practice which affect the granting of original applications.

(e) No renewal of an existing station license shall be granted more than thirty days prior to the expiration of the original license (47 U. S. C., § 307).

§ 308. Same; application; conditions and restrictions in license for foreign communication.

(a) The Commission may grant licenses, renewal of licenses, and modification of licenses only upon written application therefor received by it: *Provided, however,* That in cases of emergency found by the Commission, licenses, renewals of licenses, and modifications of licenses, for stations on vessels or aircraft of the United States, may be issued under such conditions as the Commission may impose, without such formal application. Such licenses, however, shall in no case be for a longer term than three months: *Provided, further,* That the Commission may issue by cable, telegraph, or radio a permit for the operation of a station on a vessel of the United States at sea, effective in lieu of a license until said vessel shall return to a port of the continental United States.

(b) All such applications shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station; the ownership and location of the proposed station and of the stations, if any, with which it is proposed to communicate; the frequencies and the power desired to be used; the hours of the day or other periods of time during which it is proposed to operate the station; the purposes for which the station is to be used; and such other information as it may require. The Commission, at any time after the filing of such original application and during the term of any such license, may require from an applicant or licensee further written statements of fact to enable it to determine whether such original application should be granted or denied or such license revoked. Such application and/or such statement of fact shall be signed by the applicant and/or licensee under oath or affirmation.

(c) The Commission in granting any license for a station intended or used for commercial communication between the United States or any Territory or possession, continental or insular, subject to the jurisdiction of the United States, and any foreign country, may impose any terms, conditions, or restrictions authorized to be imposed with respect to submarine cable licenses by section 35 of this title (47 U. S. C., § 308).

§ 309. Same; issuance, renewal, or modification of license; hearings; form; terms; assignment.

(a) If upon examination of any application for a station license or for the renewal or modification of a station license the Commission shall determine that public interest, convenience, or necessity would be served by the granting thereof, it shall authorize the issuance, renewal, or modification thereof in accordance with said finding. In the event the Commission upon examination of any such application does not reach such decision with respect

thereto, it shall notify the applicant thereof, shall fix and give notice of a time and place for hearing thereon, and shall afford such applicant an opportunity to be heard under such rules and regulations as it may prescribe.

(b) Such station licenses as the Commission may grant shall be in such general form as it may prescribe, but each license shall contain, in addition to other provisions, a statement of the following conditions to which such license shall be subject:

(1) The station license shall not vest in the licensee any right to operate the station nor any right in the use of the frequencies designated in the license beyond the term thereof nor in any other manner than authorized therein.

(2) Neither the license nor the right granted thereunder shall be assigned or otherwise transferred in violation of this chapter.

(3) Every license issued under this chapter shall be subject in terms to the right of use or control conferred by section 606 of this title (47 U. S. C., § 309).

§ 311. Same; refusal of license after revocation or to persons guilty of monopoly; liability to prosecution under laws against monopoly.

The Commission is hereby directed to refuse a station license and/or the permit hereinafter required for the construction of a station to any person (or to any person directly or indirectly controlled by such person) whose license has been revoked by a court under section 313 of this title, and is hereby authorized to refuse such station license and/or permit to any other person (or to any person directly or indirectly controlled by such person) which has been finally adjudged guilty by a Federal court of unlawfully monopolizing or attempting unlawfully to monopolize, radio communication, directly or indirectly, through the control of the manufacture or sale of radio apparatus,

through exclusive traffic arrangements, or by any other means, or to have been using unfair methods of competition. The granting of a license shall not estop the United States or any person aggrieved from proceeding against such person for violating the law against unfair methods of competition or for a violation of the law against unlawful restraints and monopolies and/or combinations, contracts, or agreements in restraint of trade, or from instituting proceedings for the dissolution of such corporation (47 U. S. C., § 311).

§ 313. Application of antitrust laws to manufacture, sale, and trade in radio apparatus; revocation of licenses.

All laws of the United States relating to unlawful restraints and monopolies and to combinations, contracts, or agreements in restraint of trade are hereby declared to be applicable to the manufacture and sale of and to trade in radio apparatus and devices entering into or affecting interstate or foreign commerce and to interstate or foreign radio communications. Whenever in any suit, action, or proceeding, civil or criminal, brought under the provisions of any of said laws or in any proceedings brought to enforce or to review findings and orders of the Federal Trade Commission or other governmental agency in respect of any matters as to which said Commission or other governmental agency is by law authorized to act, any licensee shall be found guilty of the violation of the provisions of such laws or any of them, the court, in addition to the penalties imposed by said laws, may adjudge, order, and/or decree that the license of such licensee shall, as of the date the decree or judgment becomes finally effective or as of such other date as the said decree shall fix, be revoked and that all rights under such license shall thereupon cease: *Provided, however,* That such licensee shall have the same right of appeal or review as is provided by law in respect of other decrees and judgments of said court (47 U. S. C., § 313).

Sections of Radio Act of 1927

SEC. 13. The licensing authority is hereby directed to refuse a station license and/or the permit hereinafter required for the construction of a station to any person, firm, company, or corporation, or any subsidiary thereof, which has been finally adjudged guilty by a Federal court of unlawfully monopolizing or attempting unlawfully to monopolize, after this Act takes effect, radio communication, directly or indirectly, through the control of the manufacture or sale of radio apparatus, through exclusive traffic arrangements, or by any other means or to have been using unfair methods of competition. The granting of a license shall not estop the United States or any person aggrieved from proceeding against such person, firm, company, or corporation for violating the law against unfair methods of competition or for a violation of the law against unlawful restraints and monopolies and/or combinations, contracts, or agreements in restraint of trade, or from instituting proceedings for the dissolution of such firm, company, or corporation. (44 Stat. 1162, 1167).

SEC. 15. All laws of the United States relating to unlawful restraints and monopolies and to combinations, contracts, or agreements in restraint of trade are hereby declared to be applicable to the manufacture and sale of and to trade in radio apparatus and devices entering into or affecting interstate or foreign commerce and to interstate or foreign radio communications. Whenever in any suit, action, or proceeding, civil or criminal, brought under the provisions of any of said laws or in any proceedings brought to enforce or to review findings and orders of the Federal Trade Commission or other governmental agency in respect of any matters as to which said commission or other governmental agency is by law authorized to act, any licensee shall be found guilty of the violation of the provisions of such laws or any of them, the court, in addition to the penalties imposed by said laws, may adjudge, order, and/or decree that the license of such licensee shall, as of the date

the decree or judgment becomes finally effective or as of such other date as the said decree shall fix, be revoked and that all rights under such license shall thereupon cease: *Provided, however,* That such licensee shall have the same right of appeal or review as is provided by law in respect of other decrees and judgments of said court. (44 Stat. 1162, 1168).